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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 482

**EDWARD JORDAN DIMOCK, AS SUBSTITUTED EX-
ECUTOR OF THE LAST WILL AND TESTAMENT
OF HENRY C. FOLGER, DECEASED, ETC., PETI-
TIONER,**

vs.

**WALTER C. CORWIN, LATE COLLECTOR OF INTER-
NAL REVENUE, FIRST DISTRICT OF NEW YORK**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1938.

CERTIORARI GRANTED JANUARY 3, 1939.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 482

EDWARD JORDAN DIMOCK, AS SUBSTITUTED EXECUTOR OF THE LAST WILL AND TESTAMENT OF HENRY C. FOLGER, DECEASED, ETC., PETITIONER,

vs.

WALTER C. CORWIN, LATE COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

1

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff-Appellant,

No. L-6839.

against

2

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,
Defendant-Appellant.

Statement Under Rule 13.

This is an appeal by the plaintiff above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Eastern District of New York, on March 21, 1938, in the above entitled case in favor of the plaintiff, Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, against the defendant, Walter C. Corwin, late Collector of Internal Revenue for the First District of New York, in the sum of \$2,483.96, with interest thereon from May 17, 1933, and costs, as taxed, in the sum of \$26.

3

This action was commenced on August 28, 1935, by the original plaintiff herein, Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, by the filing of a notice of appearance and complaint and the

4

Statement Under Rule 13.

issuance of a summons. The defendant filed an answer on April 21, 1936. Emily C. J. Folger, the original plaintiff having died on February 21, 1936, an order, dated May 1, 1936, was made and entered herein substituting Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, as plaintiff herein, in the place and stead of the deceased, Emily C. J. Folger, and by such order the complaint was amended so as to allege the death of said original plaintiff and the qualification of said Edward Jordan Dimock, as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, and as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased.

5

Issue was rejoined herein on May 5 upon the filing of the defendant's amended answer. The plaintiff served and filed a note of issue and notice of trial on May 7, 1936.

On November 17, 1936, this case was tried before Honorable Mortimer W. Byers without a jury, a jury having been waived by written stipulation of the parties. Judge Byers reserved decision.

6

On April 14, 1937, Judge Byers rendered his decision in favor of the plaintiff but for only a portion of the amount sued for. On February 8, 1938, Judge Byers filed a memorandum requesting counsel to submit findings of fact and conclusions of law in accordance with his opinion of April 14, 1937.

On February 17, 1938, an order was made and filed by Honorable Grover M. Moscowitz, upon the stipulation of the parties, amending certain paragraphs of the complaint so as to make them conform to the proof.

Statement Under Rule 13.

7

On March 15, 1938, findings of fact and conclusions of law signed by Judge Byers on March 14, 1938, were filed, together with plaintiff's requests for conclusions of law. Judge Byers refused to pass upon said requests and allowed exceptions to the plaintiff to certain conclusions of law made by the court and to the court's refusal to pass upon plaintiff's requests for conclusions of law. On the same day, the defendant's requests for findings of fact and conclusions of law were filed. This Judge Byers also refused to pass upon and allowed exceptions to the defendant to certain of the court's findings of fact and conclusions of law and to Judge Byers' refusal to pass upon the defendant's requests for findings of fact and conclusions of law.

8

On March 21, 1938, costs were taxed in the sum of \$26 and judgment was entered by the plaintiff in the sum of \$2,483.96 with interest thereon from May 17, 1933, plus costs as taxed in the sum of \$26.

On May 27, 1938, an appeal was allowed plaintiff from the said judgment of March 21, 1938 and on June 1, 1938, an appeal was allowed defendant from the said judgment of March 21, 1938.

9

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Hawkins, Delafield & Longfellow, Esqs. The defendant has been represented in the proceedings in the District Court up to December 25, 1937, by Leo J. Hickey, Esq., former United States attorney for the Eastern District of New York and was represented by Harold St. L. O'Dougherty, United States Attorney for the Eastern District of New York, from December 27, 1937 to May 9, 1938, and now is represented by Michael F. Walsh, United States Attorney for the Eastern District of New York.

Docket Entries.

1935 *Filings, proceedings, etc.*

Aug. 28—Plaintiff's notice of appearance and complaint filed. Summons issued.

Sept. 9—Summons returned and filed—served on defendant.

" 27—Stipulation extending time to answer to and including Oct. 23, 1935.

1936

April 21—Answer filed.

11 " 24—Notice of motion filed to substitute E. J. Dimock as executor, etc., in place of Emily C. J. Folger, executrix, etc.

" 29—Campbell, J., hearing on above motion—submitted.

May 1—By Campbell, J. Order filed and entered substituting Edward Jordan Dimock as executor in place of Emily C. J. Folger, executrix, deceased, etc.

" 5—Amended answer filed.

" 7—Note of issue and notice of trial filed.

12 June 5—Inch, J., case called; marked ready.

Oct. 9—Galston, J., case called; adjourned to October 22, 1936.

" 22—Galston, J., case called; adjourned to November Term, 1936.

Nov. 4—Byers, J., case called; marked ready.

" 13—Byers, J., case called; adjourned to Nov. 17, 1936.

1936

" 17—Byers, J., case called; trial ordered and concluded; jury waived on stipulation; decision reserved; briefs to be submitted Jan. 15, 1937.

Docket Entries.

13

1937

Jan. 15—By Byers, J., order filed and entered extending time to file papers to Jan. 27, 1937.

Apr. 15—Stenographer's minutes filed.

“ 15—By Byers, J., decision rendered with judgment in favor of plaintiff.

“ 15—Settle order (see opinion book).

1938

14

Feb. 8—By Byers, J., memo. filed in connection with proposed findings submitted for signature (in file).

“ 17—By Moscovitz, J., order filed amending certain paragraphs of complaint.

Mar. 15—Two sets of Findings of Fact and Conclusions of Law and Exceptions filed; judgment for the sum of \$2,483.96 with interest from May 17, 1933.

Mar. 21—Bill of costs filed with costs taxed at \$26.00.

15

“ 21—Judgment favor of plaintiff for \$2,483.96 plus interest from May 17, 1933, plus costs taxed at \$26.00 filed.

May 27—Petition for appeal and order allowing appeal, assignment of errors and bond for costs on appeal filed.

June 1—Notice of appeal, order allowing appeal and assignment of errors filed.
Citation filed.

“ 2—Citation filed.

16

Summons.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

EMILY C. J. FOLGER, as Execu-
trix of the Last Will and Tes-
tament of HENRY C. FOLGER,
deceased,

Plaintiff,

against

L-6839.

17

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District, New York,
Defendant.

To the above-named Defendant:

18

You are hereby summoned to answer the com-
plaint in this action, and file your answer and
serve a copy thereof on the plaintiff's attorneys
within twenty days after the service of this sum-
mons, exclusive of the day of service; and in case
of your failure to appear, or answer, judgment
will be taken against you by default for the re-
lief demanded in the complaint.

WITNESS, the Honorable Marcus B. Camp-
bell, Judge of the District Court of
(L. S.) the United States for the Eastern
(Seal) District of New York, at the Borough
of Brooklyn this 28th day of August
in the year one thousand nine hun-
dred and thirty-five.

PERCY G. B. GILKES,
Clerk.

By S. R. FEUER,
Deputy Clerk.

*Complaint as Amended by Orders, dated May 1, 19
1936, and February 17, 1938.*

HAWKINS, DELAFIELD & LONGFELLOW,
Plaintiff's Attorneys,
Office and Post Office Address,
49 Wall Street,
Borough of Manhattan,
New York City, N. Y.

*Complaint as Amended by Orders dated May
1, 1936, and February 17, 1938.* 20

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839.

21

Plaintiff above named, by Hawkins, Delafield
& Longfellow, her attorneys, complaining of the
defendant, alleges:

22 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

23 FIRST: That on the 11th day of June, 1930, Henry C. Folger, then a resident of the County of Nassau and State of New York, died leaving a Last Will and Testament which was thereafter and on the 25th day of June, 1930, duly admitted to probate by the Surrogate's Court of Nassau County; that in and by said Last Will and Testament plaintiff was nominated and appointed the executrix thereof, that she duly qualified as such executrix in conformity with the laws of the State of New York; that letters testamentary were duly issued to her as such executrix by said Surrogate's Court of Nassau County on the 25th day of June, 1930, and that she has been at all times since said date last mentioned and still is acting as executrix of and under said Last Will and Testament.

24 SECOND: That plaintiff is the widow of said Henry C. Folger, deceased, and at all times herein mentioned was a citizen of the State of New York and a resident and inhabitant of the County of Nassau, State of New York, which is within said Eastern District of New York.

THIRD: Upon information and belief that the defendant at all times from January 2, 1930 to and including August 20, 1933, was the Collector of Internal Revenue for the First District of New York, and during all that time was and still is a resident and inhabitant of the County of Kings, State of New York, which is in the said Eastern District of New York.

FOURTH: That this is a suit of a civil nature at law and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 25

and that this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

(A) DEATH BENEFIT

FIFTH: On information and belief, that said Henry C. Folger was on July 1, 1926 Chairman of the Board of Directors of the Standard Oil Company of New York, a New York corporation, and on that day said Standard Oil Company of New York made effective a so-called "plan for annuities and insurance" as amended, a copy of which is hereto annexed, marked Exhibit A, and by reference thereto made a part hereof. 26

SIXTH: On information and belief, that said Henry C. Folger thereafter and prior to the commencement of this action became an annuitant under said plan for annuities and insurance by retirement on February 29, 1928, and under and by virtue thereof was entitled to designate in writing the name of a beneficiary or beneficiaries to whom death benefits were to be paid. 27

SEVENTH: On information and belief, that at the time of the death of said Henry C. Folger, he was receiving an annuity of \$81,500 payable in equal monthly installments and had designated his wife, Emily C. J. Folger, as the beneficiary to whom death benefits were to be paid, and that after his death, and on the first day of each and every month commencing August 1, 1930, pursu-

28 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

ant to such plan and designation, said Emily C. J. Folger received from said Standard Oil Company of New York, as a death benefit under said plan and in equal monthly installments of \$6,967.67 each the total sum of \$81,500, being an amount equal to an annuity for one year.

29 EIGHTH: On information and belief the Commissioner of Internal Revenue in purporting to determine the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended improperly included as part of the gross and net estates of said Henry C. Folger the sum of \$79,791.63, being the value as of the date of the death of said Henry C. Folger of the right to receive said death benefit of \$81,500 in equal monthly installments for twelve months.

30 (B) WHOLE OF JOINT ESTATE TAXED ALTHOUGH
CREATED PRIOR TO ESTATE TAX ACTS

NINTH: That at the time of the death of said Henry C. Folger, he and said Emily C. J. Folger were the owners of shares of stock of certain corporations as joint tenants and not as tenants in common, under and pursuant to the laws of the State of New York, which had been registered upon the books of the corporations issuing the same, at the direction of said Henry C. Folger and Emily C. J. Folger, while both were residents of the State of New York, in such names and in such form as said Henry C. Folger and Emily C.

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 31

J. Folger directed; the names of the corporations whose stock was so owned, the market value at the date of the decedent's death and the number of shares of each kind of stock, the names in which the shares were registered and the forms of the registrations being set forth upon a schedule hereto annexed, marked Exhibit B, and by reference thereto made a part hereof.

TENTH: On information and belief, that the shares of stock jointly held by said Henry C. Folger and Emily C. J. Folger, as alleged in paragraph Ninth hereof, were of a value upon the date of death of said Henry C. Folger of \$3,773,-661.06. 32

ELEVENTH: On information and belief, that all of the shares of stock, with respect to which Exhibit B hereto annexed shows the names in which the shares were registered and the forms of registration, had either been registered in said names and in said forms of registrations upon the books of the several corporations whose stock they represented, for a period commencing prior to the 9th day of September, 1916, or else represented stock dividends or stock purchased pursuant to rights to subscribe issued with respect to shares of stock so registered for a period commencing prior to the 9th day of September, 1916, so that a joint tenancy in the same was created prior to the passage of any Federal Estate Tax Law, the dates of original registration of such shares in said names and forms, the names of the persons contributing them where ascertainable, the dates 33

34 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

and amounts of subsequent increases thereof by stock dividends and the exercise of rights to subscribe, the amounts of cash paid in such exercise and the then market values of the shares and rights at the time of such exercise being shown upon a schedule hereto annexed, marked Exhibit C, and by reference thereto made a part hereof.

35 TWELFTH: On information and belief that the law of the State of New York covers the tenancy and incidents of the tenancy created in the stock listed upon Exhibit B.

36 THIRTEENTH: On information and belief, that notwithstanding the foregoing facts, the Commissioner of Internal Revenue in purporting to determine the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended improperly included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06 instead of only \$1,886,830.53, being one-half thereof.

(C) CONTRIBUTION OF THE SURVIVING JOINT TENANT TOWARD THE PURCHASE OF JOINTLY OWNED PROPERTY

FOURTEENTH: That heretofore and prior to May 29th, 1912, Emily C. J. Folger acquired 251 shares of the capital stock of the Standard Oil Company of New York, which shares were either given to her by the decedent, Henry C. Folger or were derived from property given to her by him.

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 37

FIFTEENTH: That heretofore and prior to March 10th, 1914, Emily C. J. Folger acquired 656½ shares of the capital stock of the Standard Oil Company (California), which shares were either given to her by the decedent, Henry C. Folger, or were derived from property given to her by him.

SIXTEENTH: That heretofore and on or about February 9th, 1916, Emily C. J. Folger contributed to a joint account entitled "Henry C. Folger and Emily C. J. Folger, or the survivor" 250 of the said 251 shares of the capital stock of the Standard Oil Company of New York, as is shown upon item 13 of the schedule hereto annexed, marked Exhibit C, and by reference thereto made a part hereof, which said shares so contributed or the derivatives thereof, as appears from said Exhibit C, had a market value of \$126,791.14 at the date of the death of the decedent Henry C. Folger. 38

SEVENTEENTH: That heretofore and on or about the dates hereinafter set forth Emily C. J. Folger contributed to a joint account entitled "H. C. Folger and Emily C. J. Folger or the survivor" the said 656½ shares of the capital stock of the Standard Oil Company (California), as follows: 39

On or about February 9th, 1915.. ½ share

On or about February 24th, 1916 656 shares

which said shares so contributed, as is shown upon item 16 of the schedule hereto annexed, marked Exhibit C, and by reference thereto made a part hereof, or the derivatives thereof as appears from

40 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

said Exhibit C, had a market value of \$719,981.01 at the date of the death of the decedent, Henry C. Folger.

41 EIGHTEENTH: On information and belief, that notwithstanding the foregoing facts, the Commissioner of Internal Revenue in purporting to determine the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended improperly included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06 instead of allowing a credit against the said sum, the amounts contributed to the jointly owned property, viz., \$846,772.15, the sum of the amounts set forth in paragraphs Sixteenth and Seventeenth above.

(D) TAX PROCEEDINGS

42 NINETEENTH: That pursuant to the provisions of the Revenue Act of 1926 and the amendments thereto, plaintiff, as executrix as aforesaid, on or about the 8th day of June, 1931, duly made and executed the return for the Estate Tax on the estate of said Henry C. Folger, deceased, on form No. 706 furnished by the defendant, the Collector of Internal Revenue for the First District of New York, for that purpose, and duly filed the same in duplicate on or about the 9th day of June, 1931, in the office of said defendant, the Collector of Internal Revenue for the First District of New York.

TWENTIETH: That thereafter and on or about the 9th day of June, 1931, the plaintiff, as ex-

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 43

ecutrix as aforesaid, paid to the Collector of Internal Revenue for the First District of New York as and for Estate Tax \$43,611.18, the amount indicated as due with respect to the net estate deemed by her to be shown upon the face of said return, less a credit of 80% thereof for State Inheritance Taxes.

TWENTY-FIRST: That the net estate deemed by plaintiff to be shown upon the face of the said return amounted to \$2,814,144.52. 44

TWENTY-SECOND: That thereafter and on or about the 3rd day of May, 1933, the Commissioner of Internal Revenue, purporting to act by virtue of authority vested in him under said Revenue Act of 1926 as amended, reviewed and audited said return and made certain increases in the amount of the estate of Henry C. Folger, deceased, and assumed to impose an additional assessment against said estate under the Act aforesaid which increased the amount of the net estate to \$4,891,646.99, by adding to the amount of the net estate deemed by the plaintiff to be shown upon the face of the return the amounts, among others (a) of the death benefit from the Standard Oil Company referred to in paragraph Seventh hereof, and amounting to \$79,791.63, and (b) one-half of the value of stocks jointly owned under a tenancy created prior to the passage of any Federal Estate Tax Law, referred to in Paragraph Thirteenth hereof, and amounting to \$1,886,830.53. 45

TWENTY-THIRD: On information and belief, that said Commissioner of Internal Revenue, in as-

46 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

suming to assess an additional estate tax based upon said increase in the amount of the net estate, credited against said estate tax, to the extent of 80% thereof, the amount of state estate, inheritance, legacy and succession taxes which have been paid in respect of property included in the gross estate.

47 TWENTY-FOURTH: On information and belief, that the tax thus assessed upon a basis of such increase and after giving effect to such credit amounted to \$54,054.94, of which the sum of \$51,615.58 resulted from the inclusion of the items: (a) the death benefit of the Standard Oil Company and (b) the whole of the value of stocks jointly owned under a tenancy created prior to the passage of any Federal Estate Tax law, in so far as the same exceeded the value of one-half thereof, all hereinbefore referred to, and amounting in total to \$1,966,622.16.

48 TWENTY-FIFTH: That thereafter and on or about the 3rd day of May, 1933, the defendant Walter E. Corwin, Collector of Internal Revenue for the First District of New York, demanded of the plaintiff payment of said sum of \$54,054.94, with interest thereon from the 11th day of June, 1931, to the 26th day of April, 1933, amounting to \$6,077.85, all as and for a claimed estate tax with interest thereon.

TWENTY-SIXTH: That thereafter and on or about the 17th day of May, 1933, the plaintiff paid to the said Walter E. Corwin, Collector of Internal

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 49

Revenue for the First District of New York, the sums of \$54,054.94 and \$6,077.85, in response to said demand, involuntarily and solely to escape the pains and penalties provided for failure to pay the same and under protest that the purported tax and interest were erroneous, excessive and illegal in whole and in part.

TWENTY-SEVENTH: That thereafter and on or about the 8th day of July, 1933, the plaintiff filed with the defendant on Form 843 furnished by the defendant, a claim for the refund of Fifty-two Thousand Thirty-five and 41/100 Dollars (\$52,035.41), with interest of Six Thousand Seventy-seven and 85/100 Dollars (\$86,077.85), of which sums the amount of Fifty-one Thousand Six Hundred Fifteen and 58/100 Dollars (\$51,615.58) represented the tax on the amount of the items set forth in paragraph "TWENTY-FOURTH" above, and Five Thousand Eight Hundred Three and 57/100 Dollars (\$5,803.57) represented interest upon such tax to May 17, 1933, but on the 12th day of September, 1933, the Commissioner of Internal Revenue rejected the same. 50 51

TWENTY-EIGHTH: That, by reason of the foregoing, the defendant is indebted to the plaintiff in the sum of Fifty-one Thousand Six Hundred Fifteen and 58/100 Dollars (\$51,615.58) plus interest thereon in the sum of Five Thousand Eight Hundred Three and 57/100 Dollars (\$5,803.57) making a total of Fifty-seven Thousand Four Hundred Nineteen and 15/100 Dollars (\$57,419.15) with interest thereon from the 17th day of May, 1933.

52 *Exhibit A, Annexed to Foregoing Complaint.*

WHEREFORE, the plaintiff, Edward Jordon Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as executor of the Last Will and Testament of Emily C. J. Folger, deceased, demands judgment against the defendant for the sum of Fifty-seven Thousand Four Hundred Nineteen and 15/100 Dollars (\$57,419.15) with interest thereon from the 17th day of May, 1933.

53 HAWKINS, DELAFIELD & LONGFELLOW,
 Attorneys for Plaintiff,
 Office & P. O. Address,
 49 Wall Street,
 Borough of Manhattan,
 New York City.

Exhibit A, Annexed to Foregoing Complaint.

54 Copy of Standard Oil Company of New York
 "Plan for Annuities and Insurance."

(Printed as part of Findings of Fact at pp.
 77 to 84, inc.)

Exhibit B, Annexed to Foregoing Complaint.

THE FOLLOWING INFORMATION RELATIVE TO JOINTLY OWNED PROPERTY: NAME OF CORPORATION AND KIND OF STOCK, THE DEATH VALUE OF THE WHOLE, THE DEATH VALUE OF THE PROPERTY CONTRIBUTED BY EMILY C. FOLGER, THE SURVIVOR HEREIN, THE NUMBER OF SHARES, THE NAMES WHICH THE SHARES WERE REGISTERED AND THE FORM OF REGISTRATION.

<i>Name of corporation and kind of stock</i>	<i>Death value of whole</i>	<i>Death value of property contrib- uted by Emily C. J. Folger the survivor herein</i>	<i>Number of Shares</i>	<i>Names in which the shares were registered and the form of registration</i>
Indiana Pipe Line Com- pany, capital _____	\$ 107.25	\$ 0.00	3	H. C. Folger and Emily C. J. Folger or the survivor
New York Transit Com- pany, capital _____	40.75	0.00	2	H. C. Folger and Emily C. J. Folger or the survivor
Northern Pipe Line Company, capital _____	43.00	0.00	1	H. C. Folger and Emily C. J. Folger or the survivor
Ohio Oil Company, com- mon _____	318,200.00	0.00	4,000	H. C. Folger and Emily C. J. Folger or the survivor
			300	H. C. Folger Jr. and Emily C. J. Folger or the survivor
Prairie Oil and Gas Co., capital _____	69,720.00	0.00	1,008	H. C. Folger and Emily C. J. Folger or the survivor
			672	H. C. Folger Jr. and Emily C. J. Folger or the survivor
Prairie Pipe Line Co., capital _____	57,330.00	0.00	1,260	H. C. Folger and Emily C. J. Folger or the survivor
Star Refining Company, common _____	130.00	0.00	8	H. C. Folger and Emily C. J. Folger or the survivor
South Penn Oil Com- pany common _____	7,680.00	0.00	192	H. C. Folger and Emily C. J. Folger or the survivor
Standard Oil Company (Indiana) capital _____	533,745.00	0.00	10,440	H. C. Folger and Emily C. J. Folger or the survivor

Exhibit B, Annexed to Foregoing Complaint.

<i>Item</i>	<i>Name of corporation and kind of stock</i>	<i>Death value of whole</i>	<i>Death value of property contrib- uted by Emily C. J. Folger the survivor herein</i>	<i>Number of Shares</i>	<i>Names in which the shares were registered the form of registration</i>
10	Standard Oil Company (Kansas) common —	585.00	0.00	16	H. C. Folger and Emily C. Folger or the survivor
11	Standard Oil Company (Nebraska) common—	1,743.75	0.00	36	H. C. Folger and Emily C. Folger or the survivor
12	Standard Oil Company (New Jersey) common	891,187.50	0.00	12,250	H. C. Folger and Emily C. Folger or the survivor
13	Standard Oil Company of New York capital	279,460.31	126,791.14	8,265	H. C. Folger and Emily C. Folger or the survivor
14	Swan Finch Oil Cor- poration common ———	36.00	0.00	4	H. C. Folger and Emily C. Folger or the survivor
15	Swan Finch Oil Cor- poration preferred ———	20.00	0.00	1	H. C. Folger and Emily C. Folger or the survivor
16	Standard Oil Company of California, succes- sor to Standard Oil Company (California) common —————	1,613,632.50	791,981.01	24,730	H. C. Folger and Emily C. Folger or the survivor joint tenants and not as tenants in common
		<u>\$3,773,661.06</u>	<u>\$918,772.15</u>	<u>63,188</u>	

Exhibit C, Annexed to Foregoing Complaint.

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CONTAINS THE DATES OF THE ORIGINAL PURCHASE OF STOCK REGISTERED IN THE JOINT NAMES AND THE FORM OF REGISTRATION, THE NAMES OF THE PERSONS CONTRIBUTING TO THE PURCHASE OF THE SHARES WHERE ASCERTAINABLE, THE DATES AND AMOUNT OF SUBSEQUENT INCREASES THEREOF BY STOCK DIVIDENDS AND THE EXERCISE OF RIGHTS TO SUBSCRIBE, THE CASH PAID ON SUCH EXERCISE, THE MARKET VALUE OF THE SHARES AND THE MARKET VALUE OF THE RIGHTS AT THE TIME OF SUCH EXERCISE.

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Item 1—Indiana Pipe Line Company

Feb. 5, 1915	Purchased (\$50. par)	1 share
Aug. 15, 1929	Par reduced to \$10. and stock exchanged 3 for 1 (and \$20. cash) Received in lieu of stock held	3 shares
June 11, 1930	Total stock held (\$10. par)	3 shares
	Death value of stock originally acquired prior to Sept. 9, 1916: 3 shares at $35\frac{3}{4}$	\$ 107.25

Item 2—New York Transit Company

Feb. 5, 1915	Purchased (\$100 par)	1 share	63
June 3, 1929	Par reduced to \$10. and stock exchanged 2 for 1 (and \$62. cash) Received in lieu of stock held	2 shares	
June 11, 1930	Total stock held (\$10. par)	2 shares	
	Death value of stock originally acquired prior to Sept. 9, 1916: 2 shares at $20\frac{3}{8}$	\$ 40.75	

Item 3—Northern Pipe Line Company

Feb. 5, 1915	Purchased (\$100. par)	1 share
Apr. 1, 1928	Par reduced to \$50 and stock exchanged 1 for 1 (and \$50 cash) Received in lieu of stock held	1 share

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Exhibit C, Annexed to Foregoing Complaint.

June 11, 1930	Total stock held (\$50. par)	1 share
	Death value of stock originally acquired prior to Sept. 9, 1916:	
	1 share at	\$ 43.00

Item 4—The Ohio Oil Company

65

July 13, 1914	Purchased * (\$25. par)	50 shares
Dec. 16, 1914	Purchased * "	25 shares
Feb. 6, 1915	Purchased ** "	1 share
Feb. 21, 1916	Purchased ** "	999 shares
Dec. 30, 1922	Stock dividend * 300%	225 shares
Dec. 30, 1922	Stock dividend ** 300%	3000 "

June 11, 1930	Total stock held (\$25. par)	4300 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	4300 shares at 74	\$ 318,200.00

* Registered u/n "H. C. Folger, Jr. and
Emily C. J. Folger, or the survivor".

** Registered u/n "H. C. Folger and Emily
C. J. Folger or the survivor".

Item 5—The Prairie Oil and Gas Company

66

July 20, 1914	Purchased * (\$100. par)	55 shares
Feb. 8, 1915	Purchased * " "	1 "
Sept. 10, 1915	Purchased ** " "	55 "
Mar. 27, 1916	Purchased ** " "	54 "
Feb. 5, 1918	Sold ** " "	25 "
Dec. 20, 1922	Stock dividend * 200%	112 "
Dec. 20, 1922	Stock dividend ** 200%	168 "
Feb. 2, 1925	Par reduced to \$25. and stock exchanged 4 for 1	
	Received in lieu of stock held *	672 "
	Received in lieu of stock held **	1008 "

June 11, 1930	Total stock held (\$25. par)	1680 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	1680 shares at 41½	\$ 69,720.00

* Registered u/n "H. C. Folger, Jr. and
Emily C. J. Folger or the survivor."

** Registered u/n "H. C. Folger and Emily
C. J. Folger or the survivor".

Exhibit C, Annexed to Foregoing Complaint.

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Item 6—The Prairie Pipe Line Company

Feb. 9, 1915	Received as a 150% dividend on the 56 shares of stock of The Prairie Oil and Gas Company (see item 5 above) (\$100. par)	84 shares
Dec. 27, 1922	Stock dividend 200% (\$100 par)	168 shares
		<hr/>
		252
Jan. 12, 1929	Par reduced to \$25. and stock exchanged 4 for 1	
	Received in lieu of stock held	1008 "
Jan. 9, 1929	Stock dividend 25%	252 "
		<hr/>
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	1260 shares at 45½	\$ 57,330.00

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Item 7—The Solar Refining Company

Feb. 6, 1915	Purchased (\$100 par)	1 share
Dec. 25, 1922	Stock dividend 100% (\$100 par)	1 "
Feb. 4, 1929	Par reduced to \$25 and stock exchanged 4 for 1	
	Received in lieu of shares held	8 "
		<hr/>
June 11, 1930	Total stock held (\$25. par)	8 shares
	Death value of stock originally acquired prior to Sept. 8, 1916	
	8 shares at 16¼	\$ 130.00

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Item 8—South Penn Oil Company

June 2, 1914	Purchased (\$100 par)	20 shares
Feb. 28, 1917	Stock dividend 60% (\$100. par)	12 "
Mar. 16, 1926	Par reduced to \$25. and stock exchanged 4 for 1	
	Received in lieu of stock held	128 "
Feb. 7, 1929	Stock dividend 50% (\$25. par)	64 "
		<hr/>
June 11, 1930	Total stock held (\$25. par)	192 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	192 shares at 40	\$ 7,680.00

*Exhibit C, Annexed to Foregoing Complaint.**Item 9—Standard Oil Company (Indiana)*

Apr. 17, 1914	Purchased (\$100 par)	150	share
Apr. 25, 1914	" " "	73	"
May 11, 1914	" " "	30	"
July 14, 1914	" " "	20	"
Aug. 3, 1914	" " "	20	"
Nov. 7, 1914	" " "	50	"
Dec. 23, 1914	" " "	10	"
May 1, 1916	" " "	50	"
		403	"
Jan. 30, 1917	Sold	55	"
		348	"
Dec. 18, 1920	Par reduced to \$25. and stock exchanged 4 for 1		
	Received in lieu of stock held	1392	"
Dec. 18, 1920	Stock dividend 150%	2088	"
Dec. 28, 1922	Stock dividend 100%	3480	"
Feb. 16, 1929	Stock dividend 50%	3480	"
June 11, 1930	Total stock held (\$25 par)	10440	"
	Death value of stock originally acquired prior to Sept. 8, 1916:		
	10440 shares at 51 $\frac{1}{8}$	\$ 532,745.00	

Item 10—Standard Oil Company (Kansas)

Mar. 19, 1915	Purchased (\$100 par)	1	share
Dec. 30, 1922	Par reduced to \$25 and exchanged 4 for 1		
	Received in lieu of stock held	4	shares
Dec. 30, 1922	Stock dividend 300% (\$25 par)	12	"
June 11, 1930	Total stock held	16	"
	Death value of stock originally acquired prior to Sept. 8, 1916:		
	16 shares at 36 $\frac{9}{16}$	\$ 585.00	

Item 11—Standard Oil Company (Nebraska)

Feb. 9, 1915	Purchased (\$100 par)	1	share
Mar. 18, 1915	" " "	1	"

Exhibit C, Annexed to Foregoing Complaint.

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May 15, 1921	Stock dividend 200% (\$100 par)	4 shares
Apr. 12, 1926	* Par reduced to \$25 and exchanged 4 for 1	
	Received in lieu of stock held	24 "
May 6, 1926	Stock dividend 50% (\$25 par)	12 "
June 11, 1930	Total stock held	36 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	36 shares at 48 7/16	\$ 1,743.75
	* Certificates actually exchanged on May 21, 1926.	

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Item 12—Standard Oil Company (New Jersey)

May 19, 1914	Purchased (\$100 par)	100 shares
July 17, 1914	" " "	125 "
Aug. 5, 1914	" " "	87 "
Aug. 19, 1915	" " "	25 "
Oct. 18, 1916	" " "	488 "
		825 "
Nov. 18, 1919	Sold (\$100 par)	300 "
		225
Dec. 20, 1922	Par reduced to \$25. and stock exchanged 4 for 1	
	** Received in lieu of stock held	1248 "
	** Received in lieu of stock held	852 "
Dec. 20, 1922	Stock dividend 400% (\$25 par)	4992 "
	" " " " "	3408 "
		10500 "
Jan. 15, 1927	Subscribed to 1750 shares (\$25 par) by exercise of stock rights issued Nov. 26, 1926 at ratio of 1 to 6 and payment of \$25 cash.	
	Rights quoted at \$2.0625 ea.	
	Stock quoted at \$37.75	
	10500 rights at \$2.0625	\$ 21,656.25
	Cash 1750 at \$25.	43,750.00
	Total cost 1750 shares	\$ 65,406.25
	Stock purchased by rights 33.11%	579 1/2 shares
	Stock purchased by cash 66.89%	1170 1/2 "

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Exhibit C, Annexed to Foregoing Complaint.

June 11, 1930	Total stock held	12250 shares
	Death value thereof at \$72.75	\$ 891,187.50
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	11079½ shares at \$72.75	806,033.63
	Death value of stock acquired subsequent to Feb. 26, 1926 by the exercise of rights and the payment of cash:	
	1170½ shares at \$72.75	85,153.81
**	Stock actually exchanged on May 23, 1923	

Item 13—Standard Oil Company of New York

77	May 29, 1914	Purchased (\$100 par)	100 shares
	Aug. 13, 1914	" " "	50 "
	Aug. 14, 1914	" " "	50 "
	Aug. 17, 1914	" " "	50 "
	Aug. 18, 1914	" " "	50 "
	Aug. 28, 1914	" " "	25 "
	Nov. 9, 1914	" " "	50 "
	Feb. 8, 1915	Transferred from individual a/c H. C. Folger	1 "
			<hr/>
			376 "
	Mar. 27, 1915	Sold (\$100. par)	30 shs.
	Mar. 29, 1915	" " "	20 "
3	Mar. 31, 1915	" " "	50 "
	Apr. 9, 1915	" " "	50 "
	Apr. 17, 1915	" " "	20 "
	Apr. 19, 1915	" " "	30 "
	Nov. 4, 1918	" " "	125 "
			<hr/>
	Total sales		325 shares
			<hr/>
	Balance		51 shares
	Aug. 26, 1915	Purchased (\$100 par)	100 shares
	Feb. 9, 1916	Transferred from individual a/c Mrs. Emily C. J. Folger	250 "
	Feb. 14, 1916	Transferred from individual a/c H. C. Folger	50 "
	Feb. 18, 1916	Purchased	100 "
			<hr/>

Exhibit C, Annexed to Foregoing Complaint.

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Total original acquisitions		551 shares	
(of which:			
Mrs. Emily C. J. Folger contributed 250 shs. or		45.37%	
H. C. Folger contributed 51 shares or		9.26%	
Contribution unascertainable 250 shs. or		45.37%)	
Balance as above		551 shares	
Dec. 2, 1922	Par reduced to \$25 and stock exchanged 4 for 1		
** Received in lieu of stock held		2204	"
Dec. 2, 1922	Stock dividend 200% (\$25 par)	4408	"
Feb. 1, 1926	Stock dividend 25% (\$25 par)	1653	"
		<hr/>	
June 11, 1930	Total stock held	8265	" 80
Death value of stock originally acquired prior to Sept. 8, 1916:			
8265 shares at 33 13/16		\$ 279,460.31	
Contributed by			
Emily C. J. Folger, the survivor, 45.37%			
or		126,791.14	
H. C. Folger, the decedent 9.26% or		25,878.03	
Contribution unascertainable 45.37% or ..		126,791.14	
** Certificates actually exchanged on November 24, 1925			
 <i>Item 14—Swan Finch Oil Corporation—Common Stock</i>			
Apr. 30, 1920	Purchased \$100 par	1 share	81
Oct. 22, 1924	Par reduced to \$25 and stock exchanged 4 for 1		
** Received in lieu of stock held		4	"
		<hr/>	
June 11, 1930	Total stock held	4	"
Value of stock originally acquired in 1930			
4 shares at \$9.		\$ 36.00	
** Certificates actually issued on Oct. 22, 1924 and Nov. 17, 1924			
 <i>Item 15—Swan Finch Oil Corporation—7% Preferred Stock</i>			
Sept. 3, 1929	*Purchased (\$25 par)	1 share	
June 11, 1930	Total shares held	1	"
Value of stock acquired subsequent to Feb. 26, 1926 by the exercise of rights and the payment of cash			
		\$ 20.00	

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Exhibit C, Annexed to Foregoing Complaint.

* Purchased by exercise of right to subscribe (1 right for each Capital share held and \$25.)

Item 16—(a) *Standard Oil Company (California)*
and

(b) *Standard Oil Company of California*

	(a) <i>Standard Oil Company (California)</i>	
	Purchased (\$100 par)	50 shares
	Feb. 9, 1915 Transferred from individual a/c H. C. Folger	1 1/2 "
83	Feb. 9, 1915 Transferred from individual a/c Emily C. J. Folger	1 1/2 "
	Feb. 24, 1915 Transferred from individual a/c H. C. Folger	639 "
	Feb. 24, 1915 Transferred from individual a/c Emily C. J. Folger	656 "
	Feb. 29, 1915 Purchased	50 "
	Total original acquisitions	1397 "
	(of which	
	Mrs. Emily C. J. Folger contributed 656 1/2 shs. or	46.99%
	H. C. Folger contributed 640 1/2 shs. or	45.85%
	Contribution unascertainable 100 shs. or	7.16%
	Balance as above	1397 shares
84	April 19, 1916 stock dividend 50%	698 1/2 "
	April 16, 1917 " " 33 1/3%	698 1/2 "
	July 26, 1918 sold (\$100 par)	2794 "
	July 29, 1918 sold " "	10 shs.
	Aug. 1, 1918 " " "	20 "
		70 " 100 shares
	Mar. 10, 1921 Par reduced to \$25 and stock exchanged 4 for 1	2694 "
	** Received in lieu of stock held	10776 "
	Dec. 30, 1922 Stock dividend 100% (\$25 par)	10776 "
		21552

Exhibit C, Annexed to Foregoing Complaint.

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Apr. 25, 1923 Subscribed to 2694 shares (\$25 par) by exercise of stock rights issued Mar. 26, 1923, at ratio 1 to 8 and payment of \$25 cash
 Rights quoted at \$3.75 ea.
 Stock quoted at \$55.50
 21552 rights @ \$3.75 \$ 80,820.00
 Cash 2694 @ \$25 67,350.00

Total cost 2694 shares 148,170.00
 Stock purchased by rights 54.55% 1470 shares
 Stock purchased by cash 45.45% 1224 "

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Total stock held 24246 "
 Original acquisition:
 Prior to Sept. 8, 1916 23022 shs.
 Subsequent to Sept. 8, 1916 and prior to June 2, 1924 1224 shs.

(b) Standard Oil Company of California

May 29, 1926 The Standard Oil Company (California) was dissolved as a California corporation and the Standard Oil Company of California was incorporated in Delaware. The stock of the new company was exchanged for the stock of the old company share for share.

Received in lieu of stock held above 24246 shs.

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Dec. 16, 1929 Stock dividend (460 shares on stock acquired prior to Sept. 8, 1916, and 24 on stock acquired thereafter) 484 "

June 11, 1930 Total stock held 24730 "
 Death value of stock 24730 shares @ 65 $\frac{1}{4}$ \$1,613,632.50
 Death value of stock originally acquired prior to Sept. 8, 1916:
 23482 shares @ 65 $\frac{1}{4}$ 1,532,200.50
 Contributed by
 Emily C. J. Folger, the survivor 46.99%
 or \$ 719,981.01
 H. C. Folger, the decedent 45.85% or .. \$ 702,513.93
 Contribution unascertainable 7.16% or \$ 109,705.56

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Exhibit C, Annexed to Foregoing Complaint.

Death value of stock acquired subsequent
to Sept. 8, 1916 and prior to June 2,
1924 by the exercise of rights and the
payment of cash:

1248 shares @ 65¼	\$	81,4
Contribution unascertainable 100% or ...	\$	81,4

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

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EMILY C. J. FOLGER, being duly sworn, deposes and says: that she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge except as to those matters which are stated to be alleged upon information and belief and as to those matters she believes it to be true.

EMILY C. J. FOLGER

Sworn to before me this
27th day of August, 1935.

OWEN F. SMITH

Notary Public, Nassau County No. 1536
Certificate filed in New York County
Clerk's No. 645, Register's No. 78375
Commission Expires March 30, 1937

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SEAL

Answer as Amended by Order dated February 17, 1938, and by Stipulation, dated October 30, 1936. 91

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,
Defendant.

L-6839

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The defendant, Walter C. Corwin, by his attorney, Leo J. Hickey, United States Attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, and for his Amended Answer, states and alleges:

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I. Admits the allegations contained in paragraphs marked "First," "Second," "Third," "Fourth," "Fifth," "Sixth" and "Seventh" of the complaint.

II. Admits that the sum of \$79,791.63 was included as part of the gross and net estates of said Henry C. Folger, as stated in paragraph marked "Eighth" of the complaint, but denies that the said sum was improperly included therein.

94 *Answer as Amended by Order, dated February 17, 1938, etc.*

III. Denies each and every allegation contained in paragraph marked "Ninth" of the complaint.

IV. Admits each and every allegation contained in paragraph marked "Tenth" of the complaint.

V. Denies each and every allegation contained in paragraphs marked "Eleventh" and "Twelfth" of the complaint.

95 VI. Denies each and every allegation contained in paragraph marked "Thirteenth" of the complaint, except that it admits that the full sum of \$3,773,881.06 was included as part of the gross and net estates of the decedent.

VII. Admits each and every allegation contained in paragraphs marked "Fourteenth" and "Fifteenth" of the complaint.

96 VIII. Denies each and every allegation contained in paragraphs marked "Sixteenth," "Seventeenth" and "Eighteenth" of the complaint.

IX. Admits the allegations contained in paragraph marked "Nineteenth" of the complaint, except that the return referred to therein was filed on June 10, 1931.

X. Admits each and every allegation contained in paragraph marked "Twentieth" of the complaint, except that the tax referred to therein was paid June 10, 1931.

XI. Admits each and every allegation contained in paragraphs marked "Twenty-first," "Twenty-

Answer as Amended by Order, dated February 17, 1938, etc. 97

second," "Twenty-third," "Twenty-fourth" and "Twenty-fifth" of the complaint.

XII. Denies each and every allegation contained in paragraph marked "Twenty-sixth" of the complaint, except that he admits that the tax and interest referred to therein was paid on the date stated therein.

XIII. Admits each and every allegation contained in paragraph marked "Twenty-seventh" of the complaint. 98

XIV. Denies each and every allegation contained in paragraph marked "Twenty-eighth" of the complaint.

XV. The allegations contained in paragraphs "Twenty-ninth" and "Thirtieth" of the complaint are hereby admitted.

FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S CAUSE OF ACTION, THE DEFENDANT ALLEGES: 99

XVI. That the sum of \$57,419.15, sought to be recovered by the plaintiff, was collected by the defendant in his official character as a Collector of Internal Revenue, pursuant to an additional assessment of estate tax against the estate of the decedent, which was duly made by the Commissioner of Internal Revenue and certified to the defendant for collection from said estate; that said sum was duly remitted and paid by the de-

100 *Answer as Amended by Order, dated February
17, 1938, etc.*

101 defendant into the Treasury of the United States as a collection of internal revenue; that no part of the same was collected or exacted by the defendant excessively, illegally, or without authority of law; that no part of same has ever been returned by the United States Treasury to the defendant for the use and benefit of the plaintiff, and that defendant is not indebted to the plaintiff in said sum or any part thereof or for any interest thereon.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE
TO THE PLAINTIFF'S CAUSE OF ACTION, DEFENDANT ALLEGES:

102 XVII. Henry C. Folger died June 11, 1930, and on June 10, 1931, plaintiff filed with the Collector of Internal Revenue a federal estate tax return reporting a gross estate of \$15,602,729.24, deductions of \$12,788,584.72, which resulted in a net estate of \$2,814,144.52.

XVIII. Thereafter the Commissioner of Internal Revenue made an audit and review of said estate tax return and fixed the total value of the decedent's statutory gross estate at \$15,359,827.69, allowed deductions of \$10,468,180.70 and determined a net estate of \$4,891,646.99. The Commissioner allowed a total deduction on account of decedent's bequests to charity of \$6,396,898.00.

XIX. By the elimination from the decedent's gross estate amounting to \$15,359,827.69, of the sum of the jointly owned stock held by the deced-

Answer as Amended by Order, dated February 17, 1938, etc. 103

ent and Emily C. J. Folger, his wife, amounting to \$3,792,744.44, the balance is \$11,567,083.25. Deducting debts of the estate in the amount of \$3,971,282.61, the net value of the estate, in accordance with the valuation of the Commissioner of Internal Revenue is \$7,595,800.64, and one-half of the net value is \$3,797,900.32.

XX. Section 17 of the decedent's estate law of the State of New York provides that "No person having a husband, wife, child or parent shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association, corporation or purpose, in trust or otherwise, more than one-half part of his or her estate, for the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more." 104

XXI. The total net value of the decedent's estate, less his debts, is \$7,793,422.20, and one-half of this amount is \$3,896,711.10. The Commissioner of Internal Revenue allowed a deduction on account of bequests to charity in the amount of \$6,396,898.09, which is in excess of one-half of the net value of the decedent's estate by the amount of \$2,500,186.99, which sum is greatly in excess of the amount that plaintiff claims in this action was erroneously included by the Commissioner of Internal Revenue in the decedent's gross and net estates. 105

XXII. The allowance by the Commissioner of Internal Revenue of a deduction on account of

106 *Ansicer as Amended by Order, dated February
17, 1938, etc.*

charitable bequests in an amount in excess of one-half of the decedent's net estate was erroneous, illegal and void, and, therefore, in any event, by reason of the fact that such erroneous deduction is in excess of the amount plaintiff claims was erroneously included in decedent's gross and net estates and of the provisions of Section 17 of the decedent's estate law of the State of New York. plaintiff is not entitled to any recovery in this
107 action.

WHEREFORE, defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs.

LEO J. HICKEY,
United States Attorney,
Eastern District of New York,
Attorney for Defendant,
519 Federal Building,
Borough of Brooklyn,
City of New York.

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Answer as Amended by Order, dated February 17, 1938, etc. 109

State of New York,
Eastern District of New York, } ss.:

JOHN G. DALTON, being duly sworn, deposes and says, that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law.

Deponent further states that he has read the foregoing amended answer, and the same is true to his own knowledge and belief, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 110

Deponent further states that the reason this verification is made by deponent instead of by defendant is that the defendant is a sovereign power.

Deponent further states that the sources of his information and the grounds of his belief are correspondence and papers on file in the office of the United States Attorney, Brooklyn, New York, and information obtained in his official capacity as Assistant United States Attorney. 111

JOHN G. DALTON.

Sworn to before me this
2nd day of May, 1936.

FRANK J. PARKER,

Notary Public.

Kings Co. No. 47.

Commission Expires March 30, 1938.

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Bill of Exceptions.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

113

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

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BE IT REMEMBERED that at a stated term of the
District Court of the United States for the East-
ern District of New York, on November 17, 1936,
before the Honorable Mortimer W. Byers, United
States District Judge for the Eastern District of
New York presiding, the following proceedings
were had:

APPEARANCES:

MESSRS. HAWKINS, DELAFIELD & LONGFELLOW, At-
torneys for Plaintiff, C. O. Donahue, Esq., of
Counsel.

LEO J. HICKEY, Esq., United States Attorney for
Defendant, Clarence E. Dawson, Esq., Special
Assistant to Attorney General, John J. Dal-
ton, Esq., Assistant United States Attorney,
of Counsel.

Bill of Exceptions.

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Mr. Donahue: We have certain stipulations. The first stipulation is one waiving a jury.

(Marked Plaintiff's Exhibit 1.)

Mr. Donahue: Then I have marked copies of the pleadings, which contain certain admissions. (Considered in evidence but not marked.)

Mr. Donahue: Then I have the stipulation of facts.

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(Marked Plaintiff's Exhibit 2.)

Mr. Donahue: Then I offer certain ledger sheets of the Standard Oil Company and other corporations showing the existence of the joint accounts. I would like to offer all these sheets as one exhibit.

(Ledger sheets marked Plaintiff's Exhibit 3.)

Mr. Donahue: These are stock certificates of the Standard Oil Company of New York.

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(Marked Plaintiff's Exhibit 4.)

Mr. Donahue: I also offer certain stock certificates of the Standard Oil Company of California.

(Marked Plaintiff's Exhibit 5.)

Mr. Donahue: I offer a transcript of journal entries of the Standard Oil Company of California, showing transfer of certain shares to the joint account.

(Marked Plaintiff's Exhibit 6.)

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Bill of Exceptions.

Mr. Donahue: I offer photostatic copy of journal entries of the Standard Oil Company of California, relating to the joint account.

(Marked Plaintiff's Exhibit 7.)

Mr. Donahue: I also offer a transcript of the journal entries of the Standard Oil Company of New York, showing transfers from Mrs. Folger to the joint account.

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(Marked Plaintiff's Exhibit 8.)

Mr. Donahue: And I offer certified copy of Mr. Folger's will.

(Marked Plaintiff's Exhibit 9.)

Mr. Donahue: The only additional fact, your Honor, is that the United States Attorney has consented to stipulate on the record that the tax was paid under protest.

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Now, I have one witness, your Honor.

EDWARD JORDAN DIMOCK, the plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Donahue:

Q. Mr. Dimock, as executor of Emily C. J. Folger, deceased, and substituted executor of the will of Henry C. Folger, you are the plaintiff in this action? A. That is right.

Bill of Exceptions.

121

Q. And you are an attorney at law and a member of the firm of Hawkins, Delafield & Longfellow, who are the attorneys for the plaintiff in this action? A. That is right.

Q. Were you related to either Mr. or Mrs. Folger? A. Yes; I was Mrs. Folger's nephew.

Q. Can you state where Mr. and Mrs. Folger resided in the years 1912, 1913, and 1914? A. Yes. At that time they resided at 24 Brevort Place, Brooklyn.

Q. How long did they reside there? A. They 122
had resided either in that house or in a house in the neighborhood on Lefferts Place since prior to 1900.

Q. Did you see Mr. and Mrs. Folger occasionally during the time from 1900 to 1914? A. Yes; they often visited my house and I visited their house.

Q. Did they continue to live at Brevort Place until shortly before Mr. Folger's death? A. Yes; until a year before Mr. Folger's death they resided there. After that they moved to Glen Cove.

Q. From 1914 to the date of Mr. Folger's death did they have any residence outside of New York 123
City? A. They did not.

Q. Was Mr. Folger a member of the bar of the State of New York? A. He was.

The Court: Do I understand the residence was changed in about 1929 to Glen Cove? Is that it?

The Witness: That's right, your Honor.
Mr. Donahue: In Nassau County.

The Court: Yes.

Mr. Donahue: That is all.

Mr. Dalton: No cross examination. No testimony offered on the part of the Government.

124 **Plaintiff's Exhibit 1—Stipulation Waiving Jury.**

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

125	<p>EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;"><i>against</i></p> <p>WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,</p> <p style="text-align: right;">Defendant.</p>	} L-6839
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126 IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, that this action and the issues therein may be tried and determined by the Court without the intervention of a jury, and a jury is hereby waived.

Dated, New York, November 17, 1936.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

LEO J. HICKEY,
United States Attorney.

JOHN G. DALTON,
Assistant United States Attorney,
Attorney for Defendant.

Plaintiff's Exhibit 2—Stipulation of Facts.

127

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

v.

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

128

IT IS HEREBY STIPULATED AND AGREED, by and be-
tween the parties hereto, by their respective at-
torneys, that the following facts are to be taken
as true, provided however, that each party re-
serves and has the right to introduce other and
further evidence not inconsistent with the facts
stipulated herein.

129

I

That at the time of the death of Henry C.
Folger, he and Emily C. J. Folger were the joint
owners of shares of stock held in joint accounts in
certain corporations which were registered on the

130 *Plaintiff's Exhibit 2—Stipulation of Facts.*

books of the corporations issuing the same. The names of the corporations whose stock was so owned, the market value at the date of the decedent's death, and the number of shares of each kind of stock, the names in which the shares were registered and the forms of the registrations are correctly stated and set forth in Exhibit "B" annexed to the complaint herein, verified August 27, 1935.

131

II

That Exhibit "C" annexed to the complaint herein correctly sets forth the dates of original registration of such shares in said names and forms, the names of the persons transferring the shares to the joint account, where ascertainable, the dates and amounts of subsequent increases thereof by stock dividends, the exercise of rights to subscribe, and stock split-ups by reduction of the par value, the amounts of cash paid in such exercise of rights to subscribe, and the then market values of the shares and rights at the time of such exercise.

132

III

That on or about February 9, 1916, Emily C. J. Folger transferred from her individual account to a joint account entitled "Henry C. Folger and Emily C. J. Folger, or the survivor," 250 of the said 251 shares of the capital stock of the Standard Oil Company of New York, as is shown by item 13 of said Exhibit "C" annexed to the complaint, which shares or their derivatives, as appears from said Exhibit "C," had a market value

Plaintiff's Exhibit 2—Stipulation of Facts.

133

of \$126,791.14 at the date of the death of the decedent Henry C. Folger. Said 250 shares of the capital stock of the Standard Oil Company of New York were given to said Emily C. J. Folger by the decedent, Henry C. Folger on or about May 29, 1912 and were registered in her name on or about that date.

That on or about the dates hereinafter set forth Emily C. J. Folger transferred from her individual account to a joint account entitled "H. C. Folger and Emily C. J. Folger or the survivor" 656½ 134 shares of the capital stock of the Standard Oil Company (California), as follows:

On or about February 9th, 1915.. ½ share

On or about February 24th, 1916 656 shares

which shares, as shown in item 16 of Exhibit "C" annexed to the complaint, or the derivatives thereof, as appears from said Exhibit "C," had a market value of \$719,981.01 at the date of the death of the decedent, Henry C. Folger. Said 656½ shares of the capital stock of the Standard Oil Company (California) were given to said Emily C. J. Folger by the decedent, Henry C. Folger, between November 17, 1913 and March 10, 1914 and were registered in her name on or about the dates on which they were given to her. 135

V

That the denial contained in Paragraph "XV" of the defendant's answer, verified May 2, 1936, reading as follows:

136 *Plaintiff's Exhibit 2—Stipulation of Facts.*

"XV. Denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked 'Twenty-ninth' and 'Thirtieth' of the complaint."

be and the same is hereby withdrawn, and the allegations contained in Paragraphs "Twenty-ninth" and "Thirtieth" of the complaint are hereby admitted.

137

VI

That the plaintiff, in lieu of producing the original stock certificates, stock ledgers and stock journals of the various companies set forth in Exhibits "B" and "C," may offer in evidence, without objection by the defendant, transcripts or photostats of such stock certificates, stock ledger and stock journal entries of said companies (which entries are hereby admitted to be made in the regular course of business) and said transcripts or photostats need not be identified by any witness, but shall be identified by reference to the initials of the attorneys for the parties hereto endorsed on the back thereof.

138

VII

That all of the stock in the joint accounts in the name of "Henry C. Folger and Emily C. J. Folger, or the survivor" was either

(1) Stock which was the property of Henry C. Folger and originally registered in his name and which was transferred by him to the joint account; or

Plaintiff's Exhibit 2—Stipulation of Facts.

139

(2) Stock purchased by Henry C. Folger and registered in the names of "Henry C. Folger and Emily C. J. Folger, or the survivor" in the first instance; or

(3) Stock purchased by Henry C. Folger and given by him to Emily C. J. Folger, and registered in her name, and subsequently transferred to the joint account by her (the stock referred to in paragraphs III and IV of this stipulation is the only stock of this class); or

140

(4) The proceeds of stock dividends, the exercise of rights, and increases by split-ups which were derived from stock of the preceding three classes.

No consideration in money or money's worth was paid to the decedent Henry C. Folger for said stocks by Emily C. J. Folger.

Schedule C annexed to the complaint shows to which class the stock in the joint account belonged.

141

VIII

That the plaintiff filed with the Collector of Internal Revenue an estate tax return reporting a gross estate of \$15,602,729.24, deductions of \$12,788,584.72, resulting in a net estate of \$2,814,144.52; that the Commissioner of Internal Revenue fixed the total value of decedent's gross estate at \$15,359,827.69, allowed deductions of \$10,468,180.70 and determined a net estate of \$4,891,646.99; that the said Commissioner allowed a total deduction on account of decedent's bequests to charity of \$6,396,898.00.

142

Plaintiff's Exhibit 2—Stipulation of Facts.

IX

Paragraph XIX of defendant's amended answer verified the 2nd day of May, 1936, is hereby amended to read as follows, and as so amended is admitted by plaintiff.

143

"XIX. By the elimination from the decedent's gross estate amounting to \$15,359,827.69 of the sum of the jointly owned stock held by the decedent and Emily C. J. Folger, his wife, amounting to \$3,792,744.44, the balance is \$11,567,083.25. Deducting debts of the estate in the amount of \$3,971,282.61, the net value of the estate in accordance with the valuation of the Commissioner of Internal Revenue is \$7,595,800.64, and one-half of the net value is \$3,797,900.32."

Dated, October 30, 1936.

144

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

LEO J. HICKEY,
United States Attorney.

JOHN G. DALTON,
Assistant U. S. Attorney,
Attorney for Defendant.

Further Stipulation of Facts.

145

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

146

WHEREAS, the parties hereto have executed a
stipulation of facts dated October 30, 1936 and de-
sire to supplement said stipulation with additional
facts

147

NOW, THEREFORE

IT IS HEREBY STIPULATED AND AGREED as follows:

(1) That after the death of Henry C. Folger
all persons who under the intestate laws of the
State of New York would be entitled to a share
of his estate executed certain written waivers;

(2) That certified copies of the said waivers ex-
ecuted by said persons, namely, Edward P. Folger,
Stephen Lane Folger, Emily C. J. Folger and
Mary Folger Wells be submitted in evidence and
become a part of the record herein as Defendant's

148

Further Stipulation of Facts.

Exhibit A collectively with the same force and effect as though the said waivers had been offered in evidence at the trial herein and said certified copies of said waivers shall be deemed to be included in and be a part of the record herein as Defendant's Exhibit A;

149 (3) That the decedent made bequests to charity of a value at the date of his death of \$6,396,898.00; that such bequests were paid by the executrix or will be paid by the substituted executor to a corporation organized and operated exclusively for charitable purposes as defined by Section 303, subdivision (a) (3) of the Revenue Act of 1926;

150 (4) That this stipulation shall be deemed part of and a supplement to the stipulation of facts dated October 30, 1936, which was submitted at the trial herein and marked "Plaintiff's Exhibit 2," and shall be deemed to be included in and be a part of the record herein as part of Plaintiff's Exhibit 2 with the same force and effect as though the provisions hereof had been incorporated in the said stipulation of facts dated October 30, 1936, and that this case and the trial thereof be opened for the sole purposes of making effective the provisions hereof.

Dated, New York, New York, February 5, 1937.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

LEO J. HICKEY,
United States Attorney,
Attorney for Defendant.

By JOHN G. DALTON,
Assistant U. S. Attorney.

So Ordered:
Feb. 6, 1937.

M. W. B.,
U. S. D. J.

Plaintiff's Exhibit 9—Will of Henry C. Folger. 151

I, HENRY C. FOLGER, of Brooklyn, New York, do make, publish and declare this to be my last Will and testament.

FIRST: I give and bequeath the sum of Fifty Thousand Dollars (\$50,000.), in securities or cash, to my sister, Mary Folger Wells, and a like sum to each of my two brothers, Stephen L. Folger and Edward P. Folger.

SECOND: I give and bequeath the sum of Twenty-Five Thousand Dollars (\$25,000.), in securities or cash, to my nephew, Henry C. Folger, 3rd., and a like sum to each of my five nieces, Lida Wells Cleaveland, Elizabeth Wells Geissman, Mary Wells Smith, Dorothy Folger Straley, and Eleanor Folger. 152

THIRD: I nominate and appoint my wife, Emily C. J. Folger, as Executrix of this my last Will and testament, and, provided she shall so desire, I hereby give her power to designate my brother, Stephen Lane Folger, or her nephew, Edward Jordan Dimock, as joint executor with her. In case my said wife shall not qualify as such executrix, I nominate and appoint my brother, Stephen Lane Folger, sole Executor of this my last Will and testament; and in case neither my said wife nor my said brother shall qualify, I nominate and appoint Edward Jordan Dimock sole Executor. 153

I hereby direct that none of the persons above named shall be required to give any bond or security for the proper discharge of his duty.

In case none of the persons above named shall qualify, I nominate and appoint the Seaboard National Bank, of the City of New York, as Executor.

154 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

FOURTH: In case my said brother shall qualify and act as Executor of this Will, I give and bequeath to him the additional sum of Fifty Thousand Dollars (\$50,000.) in lieu of all executor's fees and commissions; and in case said Edward Jordan Dimock shall qualify as such executor, I give and bequeath to him the sum of Fifty Thousand Dollars (\$50,000.) in lieu of all executor's fees and commissions.

155 FIFTH: All the rest, residue and remainder of my property, both real and personal, I give, devise and bequeath to the Trustees of Amherst College and to their successors in said office as Trustees of said College, to have and to hold, IN TRUST, however, for the uses and purposes and subject to the conditions hereinafter specified and not otherwise, to wit:

156 (a) That within three years from the date of my death said Trustees shall install and establish my Shakespeare collection, consisting of books, pamphlets, documents, manuscripts, pictures, art objects, and other items relating to Shakespeare, as a permanent library in a building in the city of Washington, D. C., said library and building to be known as the "Folger Shakespeare Memorial", and shall thereafter maintain said library, and all additions thereto, as a separate and distinct library under said name, in said city, for the promotion and diffusion of knowledge in regard to the history and writings of Shakespeare, and shall keep the said library open to all students of Shakespeare under such reasonable regulations as said Trustees may from time to time adopt; and,

Plaintiff's Exhibit 9—Will of Henry C. Folger. 157

(b) If prior to my death I shall have acquired or made arrangements to acquire a lot in said city for the erection of said building, said Trustees shall retain said lot or complete the arrangements for the acquisition thereof; and should I have had plans prepared and the construction of said building begun, said Trustees shall proceed immediately, and within three years from the date of my death complete the erection of said building on said lot; otherwise said Trustees shall within three years from the date of my death acquire a suitable lot in said city of Washington and erect thereon a suitable fireproof building for the housing of said library and for the convenient use and exhibition of the same; and for the acquiring of said lot and the completion of the library building as hereinbefore stated, said Trustees my use and expend the income, and so much of the principal, of my estate, other than said Shakespeare collection, as may be necessary for said purposes; and 158

(c) Within the said period of three years from the date of my death said Trustees shall set aside all the rest, residue and remainder of the property hereby bequeathed and devised to them in trust (except the said library collection and the amount expended in the acquisition of said lot and the construction of said building), and with the same shall establish a fund to be known as the "Folger Shakespeare Memorial Fund", and shall keep said fund intact, except as hereinafter specified, and keep the same invested in good and safe income-bearing securities, with power to sell or dispose of any of the property or secu- 159

160 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

rities in said fund and reinvest the proceeds thereof and to change investments from time to time and to manage and control said fund and receive the income thereof and to use the income from said fund as hereinafter directed and not otherwise; and

161 (d) Said Trustees, as entire compensation for their services in administering the trust herein created, shall take out of the income from said fund and pay over or use for the benefit of said Amherst College one-fourth of the annual net income thereof until such one-fourth of the annual net income equals Two Hundred and Fifty Thousand Dollars (\$250,000), but shall take and use for said purpose not less than One Hundred Thousand Dollars (\$100,000.) per year; that is, the minimum amount which is to be taken, paid over and used for the benefit of Amherst College, out of the annual income, is to be not less than One Hundred Thousand Dollars (\$100,000.) per year nor more than Two Hundred and Fifty Thousand Dollars (\$250,000.) per year; and

162

(e) Said Trustees shall next, out of the remainder of said annual income from said fund, pay to my wife, Emily C. J. Folger, Fifty Thousand Dollars (\$50,000.) per year during her natural life, payable in quarterly instalments; and

(f) Said Trustees shall next, out of the remainder of said annual income, pay Five Thousand Dollars (\$5,000.) per year to each of my said two brothers and one sister, and to each of Mrs. Folger's one brother and two

Plaintiff's Exhibit 9—Will of Henry C. Folger. 163

sisters, during the life of each, to be paid quarterly; and Two Thousand Dollars (\$2,000.) per year, to be paid quarterly, to each of my five nieces and one nephew and to each of Mrs. Folger's two nieces and two nephews during the life of each; and

(g) All the balance of the income from said fund shall be used by said Trustees for the maintenance, upkeep and enlargement of said library and for the necessary administration expenses and for additions to the collection 164 in keeping with its original character, and for the upkeep and additions to said building and its equipment, and for other purposes consistent with the foregoing, which tend to increase the usefulness of the library as an institution for promoting and diffusing knowledge of the writings and history of Shakespeare; and

(h) The principal of said "Folger Shakespeare Memorial Fund" shall be kept intact, provided that to the extent that it may at any time exceed Ten Million Dollars (\$10,000,000.) 165 it may be used for acquiring additions to the library and its development, and if for any reason the value of the properties in said fund should be at any time less than Ten Million Dollars (\$10,000,000.), sufficient of the income shall be used as soon as practicable to restore said fund so that it shall be always of the value of at least Ten Million Dollars (\$10,000,000).

SIXTH: In case the said Trustees of Amherst College, or their successors, shall fail or refuse to accept the trust herein created, or shall fail to

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166 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

comply with any of the several clauses or any of the conditions or provisions of the foregoing FIFTH paragraph hereof, or if said Amherst College and said Board of Trustees should cease to exist, then and in that event the bequests and devises herein made to said Trustees shall be revoked, forfeited and terminated and the property bequeathed and devised and held by them hereunder shall be assigned, transferred and vest in the Trustees of the University of Chicago, and their successors as such Trustees, who shall thereupon hold same under the same trusts, conditions and provisions as if they had been originally designated herein as Trustees of said property, except that in such case any of the income herein provided to be taken out, paid or used for the benefit of Amherst College shall be taken out, paid or used for the benefit of said University of Chicago; and if said Trustees of the University of Chicago, or their successors, shall fail or refuse to accept the trust herein created, or shall fail to comply with any of the several clauses or any of the conditions or provisions of the foregoing FIFTH paragraph hereof, or if said University of Chicago and said Board of Trustees should cease to exist, then and in that event the bequests and devises herein made to said Trustees shall be revoked, forfeited and terminated and the property bequeathed and devised and held by them hereunder shall be assigned and transferred and vest in the Library of Congress Trust Fund Board with the same powers and subject to the same conditions as if they had originally been named herein as Trustees, and upon the further condition that they keep the said Library intact in a separate library building, as a distinct and separate part of the Congressional Library under the name of "Folger

Plaintiff's Exhibit 9—Will of Henry C. Folger. 169

Shakespeare Memorial", and that the income herein bequeathed for the use of said Colleges, or either of them, shall be used as the residue of the income for the upkeep and additions to said Library.

SEVENTH: My wife, Emily C. J. Folger, has from the beginning aided me greatly with her advice and counsel, and has shared in developing my plan for a Shakespeare Memorial Library, and has assisted me in the selection and care of my collection. I therefore request that the Trustees under said Will permit my said wife to borrow books and other items from said collection freely and without restriction, and that they consult her in the case of all plans of the said library and all regulations and expenditures pertaining to the same, other than routine disbursements; this request is not obligatory nor binding upon the said Trustees, and I hereby provide and declare that their compliance with the same shall not in any manner constitute a violation of any of the conditions contained in the several clauses of Paragraph FIFTH hereof. 170 171

EIGHTH: All persons who under the intestate laws of the State of New York would be entitled to a share of my estate should I have died intestate, desiring to aid in the establishment of said "Folger Shakespeare Memorial" library, and in consideration of the grants and bequests herein made to them, have consented to this Will and waived in writing all of their rights to object thereto or to protest against it for any cause. If objection or protest be made to the probate of this Will, or to the carrying out of its provisions, and

172 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

173 if the courts having jurisdiction of my estate should finally decide that the grant herein made to said Trustees is for a greater part of my estate than can be legally devised and bequeathed to them for the purposes and uses stated, then I direct that said devise and bequest to said Trustees shall in any case remain in force and include said Shakespeare library and collection and so much more of my estate as may legally be devised and bequeathed for the purposes stated, said library and said portion of my estate to be held by said Trustees for the purposes and uses and subject to the conditions hereinbefore stated in Paragraph FIFTH hereof, and all the rest and remainder of my estate not otherwise specifically bequeathed and not included in the devises and bequests which said Trustees shall be allowed to retain and have, I give, devise and bequeath to my said wife, Emily C. J. Folger, absolutely. It is my wish, but I do not so direct, that in such case she shall give and grant or bequeath such estate, or such portion thereof as she may deem best, for the use and maintenance of said Folger Shakespeare Memorial.

174

NINTH: Should any of the beneficiaries named in this Will object to the probate thereof, or in any wise, directly or indirectly, obstruct, contest, or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event I annul my bequests herein made to such beneficiaries, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate.

Plaintiff's Exhibit 9—Will of Henry C. Folger. 175

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of March, One Thousand Nine Hundred and Twenty-Seven.

HENRY C. FOLGER (L. S.)

Signed, sealed, published and declared by Henry C. Folger, the testator above named, as and for his last Will and Testament, in our presence and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses. 176

A. G. WELSH residing at 18 Lakeside Drive
Baldwin, N. Y.

WILLIAM J HIGGS residing at Maplewood N J,
ARTHUR T ROBERTS residing at Bronxville N. Y.

178 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

STATE OF NEW YORK, }
 COUNTY OF NASSAU, } ss.:
 SURROGATE'S COURT, }

179 Recorded in the office of the Surrogate of Nassau County, in Liber 43 of Wills of Real Estate, page 1 the foregoing last Will and Testament of HENRY C. FOLGER, deceased, as a will of real and personal estate, and the decree admitting the same to probate in the Surrogate's Court in the said County of Nassau, which record is signed and hereby certified by me pursuant to the provisions of the statutes of the State of New York.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the said Surrogate's Court, at the Surrogate's office aforesaid, this 25th day of June, 1930.

EDWIN W. WEEKS,
 Clerk of the Surrogate's Court.

[SEAL]

Plaintiff's Exhibit 9—Will of Henry C. Folger. 181

STATE OF NEW YORK,
COUNTY OF NASSAU, } ss.:
SURROGATE'S COURT, }

I, EDWIN W. WEEKS, Clerk of the Surrogate's Court of the County of Nassau, do certify that I have compared the preceding with the original record of the last Will and Testament of HENRY C. FOLGER, deceased, as the same was proved in the Surrogate's Court of said County, on the 25th day of June, 1930, and is recorded in said office in the Book of Wills of Real Estate, Number 43, page 1 and that the same is a correct copy thereof, and of the whole of such original. 182

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Surrogate's Court of the said County of Nassau, at Mineola, in said County this 16th day of July, 1930.

EDWIN W. WEEKS,
Clerk of the Surrogate's Court.

[SEAL]

183

184

Defendant's Exhibit A.**SURROGATE'S COURT,****COUNTY OF NASSAU.**

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

185

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

EDWARD P. FOLGER, the undersigned, the brother
of Henry C. Folger, deceased, does hereby appear
in person and waive the issue and service of a
citation in the above entitled matter and consent
that said instrument bearing date March 10, 1927,
be forthwith admitted to probate, and

186

WHEREAS, said Henry C. Folger left him sur-
viving a widow, Emily C. J. Folger, and

WHEREAS, Section 17 of the Decedent Estate
Law of the State of New York provides in sub-
stance that no person having a wife shall, by will,
give to any charitable purpose more than one-half
of his estate and that any such gift shall be valid
to the extent of one-half and no more, and

WHEREAS, said Henry C. Folger left him surviv-
ing his sister, Mary F. Wells, and two brothers,
Stephen L. Folger, and the undersigned, Edward

Defendant's Exhibit A.

187

P. Folger, who, with the widow, would be the only persons who would share in any of his property undisposed of by will,

Now, ~~THEREFORE~~, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, he might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for his sole interest in said property the disposition or dispositions made for him in said Last Will and Testament.

188

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger, and shall be without force or effect unless and until all of said interested persons have made similar waivers.

189

Dated, June 19th, 1930.

EDWARD P. FOLGER

Witness:

CHARLOTTE AUBRY
E. J. DIMOCK

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

On this 21st day of June, 1930, before me came E. J. DIMOCK, a subscribing witness to the foregoing instrument, with whom I am personally ac-

190

Defendant's Exhibit A.

quainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau County, New York; that he knows Edward P. Folger to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw him execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

191

HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A
Commission expires March 30, 1932

[SEAL]

SURROGATE'S COURT,
COUNTY OF NASSAU.

192

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

STEPHEN L. FOLGER, the undersigned, a brother of Henry C. Folger, deceased, does hereby appear in person and waive the issue and service of a citation in the above entitled matter and consent

Defendant's Exhibit A.

193

that said instrument bearing date March 10, 1927, be forthwith admitted to probate, and

WHEREAS, said Henry C. Folger left him surviving a widow, Emily C. J. Folger, and

WHEREAS, Section 17 of the Decedent Estate Law of the State of New York provides in substance that no person having a wife shall, by will, give to any charitable purpose more than one-half of his estate and that any such gift shall be valid to the extent of one-half and no more, and

194

WHEREAS, said Henry C. Folger left him surviving his sister, Mary F. Wells, and two brothers, Edward P. Folger and the undersigned, Stephen L. Folger, who, with the widow, would be the only persons who would share in any of his property undisposed of by will,

NOW, THEREFORE, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, he might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for his sole interest in said property the disposition or dispositions made for him in said Last Will and Testament.

195

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger,

196

Defendant's Exhibit A.

and shall be without force or effect unless and until all of said interested persons have made similar waivers.

Dated, June 20th, 1930.

STEPHEN LANE FOLGER.

Witness:

E. J. DIMOCK

197

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

198

On this 21st day of June, 1930, before me came E. J. DIMOCK, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau County, New York; that he knows Stephen Lane Folger to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw him execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A
Commission expires March 30, 1932

[SEAL]

Defendant's Exhibit A.

199

SURROGATE'S COURT,

COUNTY OF NASSAU.

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

200

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

EMILY C. J. FOLGER, the undersigned, the widow
of Henry C. Folger, deceased, does hereby appear
in person and waive the issue and service of a
citation in the above entitled matter and consent
that said instrument bearing date March 10, 1927,
be forthwith admitted to probate, and

WHEREAS, said Henry C. Folger left him sur-
viving a widow, Emily C. J. Folger, and

201

WHEREAS, Section 17 of the Decedent Estate
Law of the State of New York provides in sub-
stance that no person having a wife shall, by will,
give to any charitable purpose more than one-half
of his estate and that any such gift shall be valid
to the extent of one-half and no more, and

WHEREAS, said Henry C. Folger left him surviv-
ing his sister, Mary F. Wells, and two brothers,
Stephen L. Folger and Edward P. Folger, who
with the widow, would be the only persons who
would share in any of his property undisposed of
by will,

202

Defendant's Exhibit A.

NOW, THEREFORE, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, she might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for her sole interest in said property the disposition or dispositions made for her in said Last Will and Testament.

203

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger, and shall be without force or effect unless and until all of said interested persons have made similar waivers.

Dated, June 19, 1930.

EMILY C. J. FOLGER.

204 Witness:

E. J. DIMOCK

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 21st day of June, 1930, before me came E. J. DIMOCK, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau

Defendant's Exhibit A.

205

County New York; that he knows Emily 'C. J. Folger to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw her execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A 206
Commission expires March 30, 1932

[SEAL]

SURROGATE'S COURT,
COUNTY OF NASSAU.

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

207

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

MARY F. WELLS, the undersigned, a sister of
Henry C. Folger, deceased, does hereby appear
in person and waive the issue and service of a
citation in the above entitled matter and consent

208

Defendant's Exhibit A.

that said instrument bearing date March 10, 1927, be forthwith admitted to probate, and

WHEREAS, said Henry C. Folger left him surviving a widow, Emily C. J. Folger, and

209

WHEREAS, Section 17 of the Decedent Estate Law of the State of New York provides in substance that no person having a wife shall, by will, give to any charitable purpose more than one-half of his estate and that any such gift shall be valid to the extent of one-half and no more, and

WHEREAS, said Henry C. Folger left him surviving his two brothers, Stephen L. Folger and Edward P. Folger, and a sister, the undersigned Mary F. Wells, who, with the widow, would be the only persons who would share in any of his property undisposed of by will,

210

NOW, THEREFORE, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, she might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for her sole interest in said property the disposition or dispositions made for her in said Last Will and Testament.

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger,

Defendant's Exhibit A.

211

and shall be without force or effect unless and until all of said interested persons have made similar waivers.

Dated, June 20th, 1930.

MARY FOLGER WELLS

Witness:

E. J. DIMOCK

212

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 21st day of June, 1930, before me came E. J. DIMOCK, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau County, New York; that he knows Mary Folger Wells to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw her execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

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HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A
Commission expires March 30, 1932

[SEAL]

214

Defendant's Exhibit A.

SURROGATE'S COURT,
NASSAU COUNTY.

IN THE MATTER OF
Estate of
HENRY C. FOLGER,
Deceased.

STATE OF NEW YORK, }
215 COUNTY OF NASSAU, } ss.:

I, EDWIN W. WEEKS, Clerk of the Surrogate's Court of the County of Nassau, do hereby certify that I have compared the annexed copy of Waivers of Edward P. Folger, Stephen L. Folger, Emily C. J. Folger and Mary F. Wells, with the original thereof, as the same is filed in the office of the Surrogate of Nassau County, and that the said copy is a true and correct copy of the said original and of all thereof.

216

IN TESTIMONY WHEREOF, I have here-
unto subscribed my name and affixed
the seal of said Court, this 9th day of
October, 1936.

[L. S.]

EDWIN W. WEEKS,
Clerk of the Surrogate's Court.

[SEAL]

Findings of Fact and Conclusions of Law. 217

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

218

This cause having come on to be tried at a term of the United States District Court for the Eastern District of New York held at the Federal Building, Borough of Brooklyn, City and State of New York, on November 17, 1936, before me, the undersigned, one of the Judges of said Court, and the plaintiff having appeared by Hawkins, Delafield & Longfellow, his attorneys herein, by C. O. Donahue, of Counsel, and the defendant having appeared by Leo J. Hickey, the then United States Attorney for the Eastern District of New York, his attorney herein, by John G. Dalton, assistant United States Attorney, of counsel, and the parties, by their said attorneys, having by stipulation filed at the opening of trial waived trial by jury

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220 *Findings of Fact and Conclusions of Law.*

and consented to the trial and determination of the case by the Court without the intervention of a jury, and the said cause having been duly tried before the undersigned, and the allegations, proofs and arguments of the respective parties having been duly heard, and due deliberation having been had, I, the undersigned, one of the Judges of said Court, do hereby make and file pursuant to the stipulation of facts upon which the cause was submitted the following Findings of Fact and

221 Conclusions of Law, which have been agreed to by the respective attorneys pursuant to the decision of the Court embodied in an opinion dated April 14, 1937:

FINDINGS OF FACT

1. That on June 11, 1930, Henry C. Folger, a resident of the County of Nassau in the State of New York, and an attorney and counsellor at law of the State of New York, died leaving a Last Will and Testament which was thereafter,

222 and on June 25, 1930, duly admitted to probate by the Surrogate's Court of Nassau County.

2. That in and by said Last Will and Testament, Emily C. J. Folger, his widow, was nominated and appointed the Executrix thereof and Edward Jordan Dimock Substitutionary Executor thereof: that said Emily C. J. Folger duly qualified as such Executrix in conformity with the Laws of the State of New York, whereupon Letters Testamentary were duly issued to her, as such Executrix, by the said Surrogate's Court of Nassau County on June 25, 1930, and said Emily C. J. Folger at all times since the said date of

Findings of Fact and Conclusions of Law.

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her appointment and up to February 21, 1936, the date of her death, acted as Executrix of and under said Last Will and Testament.

3. That said Emily C. J. Folger, as such Executrix as aforesaid, instituted this action prior to her death while she was a citizen of the State of New York, and a resident and inhabitant of the County of Nassau, State of New York, which is within the Eastern Federal Judicial District of New York.

224

4. That said Emily C. J. Folger died a resident of the County of Nassau, State of New York, leaving a Last Will and Testament by which she appointed said Edward Jordan Dimock, a resident of Manhasset, Nassau County, New York, her Executor; said Last Will and Testament was duly admitted to probate on March 9, 1936, by the Surrogate's Court of the County of Nassau, and Letters Testamentary were issued on March 9, 1936, by the Surrogate's Court of Nassau County to Edward Jordan Dimock, who duly qualified, and has acted at all times since the date last mentioned and still is acting as Executor of and under said Last Will and Testament.

225

5. That the said Edward Jordan Dimock qualified as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, on March 30, 1936, and Letters Testamentary thereon were issued to said Edward Jordan Dimock by the Surrogate's Court of the County of Nassau on March 30, 1936, and he duly qualified and has acted at all times since said date last men-

Findings of Fact and Conclusions of Law.

tioned and still is acting as Substituted Executor of and under said Last Will and Testament.

6. By an order of this Court, dated May 1, 1936, Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, was substituted as plaintiff herein, in the place and stead of Emily C. J. Folger, deceased Executrix of the Last Will and Testament of Henry C. Folger, deceased.

7. That Walter C. Corwin, defendant, at all times from January 2, 1930, to and including August 20, 1933, was the Collector of Internal Revenue for the First District of New York, and during all that time was and still is a resident and inhabitant of the County of Kings, State of New York, which is in the said Eastern Federal Judicial District of New York.

(A) DEATH BENEFIT

8. That on July 1, 1926, Henry C. Folger was Chairman of the Board of Directors of the Standard Oil Company of New York, a New York corporation, and on that day said Standard Oil Company of New York made effective a so-called "Plan for Annuities and Insurance" as amended, which provided as follows:

Findings of Fact and Conclusions of Law. 229

STANDARD OIL COMPANY OF NEW YORK
PLAN FOR ANNUITIES AND INSURANCE
AS AMENDED.

EFFECTIVE JULY 1, 1926.

PART ONE: ADMINISTRATION.

This plan shall be administered under the direction of the Board of Directors by a committee appointed by the Board known as "The Finance Committee." 230

PART TWO: ANNUITIES.

SECTION 1. ELIGIBILITY.

All employees of this Company are eligible for retirement on annuity under the following conditions:

A. REGULAR RETIREMENT.

1. Domestic Service. 231

All men who have reached the age of 65 years and women 55 years and who have been 20 years or longer in the continuous active service of this Company (except those coming within the provisions of Paragraph Number Two hereof), shall be retired on a regular allowance unless in individual cases some later date be fixed by the Board of Directors for such retirement.

2. Foreign Service.

All men and women who have reached the age of 55 years and who have been 20 years or longer

232 *Findings of Fact and Conclusions of Law.*

in the continuous active service of the Company, outside of the United States of America or British Isles, shall be retired on a regular allowance, unless in individual cases, some later date be fixed by the Board of Directors for such retirement.

B. OPTIONAL OR DISCRETIONARY RETIREMENT.

1. Domestic Service.

233

Any man who has reached the age of 55 years or any woman who has reached the age of 50 years, who has been 30 years or longer in the continuous active service of the Company, or any man who has reached the age of 60 years who has been 20 years or longer in the continuous active service of the Company (except those coming within the provisions of Paragraph Number Two hereof), may be retired on a regular allowance, either at his or her request, with the approval of the Board of Directors, or without the request of the employee, at the discretion of the Board of Directors.

234

2. Foreign Service.

Any man or woman who has reached the age of 50 years, and who has been 20 years or more in the continuous active service of the Company outside of the United States of America or British Isles, may be retired on a regular allowance, either at his or her request, with the approval of the Board of Directors, or without the request of the employee, at the discretion of the Board of Directors.

SECTION 2. PAYMENTS.**A. AMOUNT OF PAYMENTS.**

The amount of payments for all such regular allowances which the Board authorizes shall be as follows:

For each year of continuous active service an allowance of 2 per cent. of the average annual pay during the five years next preceding retirement; but no regular allowance shall be in excess of 75 per cent. of such annual pay, except that for the first year from the date of retirement the annuitant shall receive an amount equivalent to the full salary in effect at the time of retirement.

236

For the purpose only of computing the amount of the annuity to be paid to employees of American or European nationality who have been or may be in the Foreign Service, outside of their native countries, each year of such Foreign Service shall be computed as one and one-half times Domestic or Home Service; that is to say, should such employee be 5 years in the continuous active service of the Company in the United States of America or British Isles and 20 years in the continuous active service of the Company outside of the United States of America or British Isles and outside of his native country, the amount of the annuity would be computed as follows:

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Domestic Service 5 years	@ 2%—10%
Foreign Service 20 years plus	

10 years—30 years	@ 2%—60%
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A total of	70%
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238 *Findings of Fact and Conclusions of Law.*

The amount of annuity, however, shall in no case exceed the maximum of 75% of the average annual pay of the annuitant as determined above.

B. METHOD OF PAYMENTS.

Annuities are to be paid monthly by check to the order of the annuitant and mailed to his or her address.

239 **SECTION 3. GENERAL ANNUITY RULES.**

A. Annuities terminate at the death of the annuitant.

B. If in the judgment of the Board of Directors any annuitant engages in a business prejudicial to the interests of this Company or conducts himself in a manner prejudicial to the reputation of this Company, the Board of Directors by a majority vote may terminate his annuity.

240 C. If any annuitant re-enters the service of this Company his annuity shall terminate unless otherwise provided by the Board of Directors.

D. Proof of age when required shall be by affidavit, stating time and place of birth. The Company's records concerning an employee's length of service and his or her average earnings in salary or wages shall be conclusive for the purpose of this plan.

PART THREE: DEATH BENEFITS.

SECTION 1. ELIGIBILITY.

The beneficiaries of all employees of one year's continuous active service and the beneficiaries of all annuitants retiring on or after July 1, 1919,

Findings of Fact and Conclusions of Law.

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shall without contribution on their part be eligible to death benefits in accordance with and subject to the conditions and exceptions of the following plan:

SECTION 2. AMOUNT OF BENEFITS.

A. ACTIVE EMPLOYEES.

The amount of death benefits payable under this section of the plan to the beneficiaries of active employees subject to the conditions and exceptions hereinafter provided shall be in accordance with the following table:

242

Term of Service	Benefit
1 year	3 months' full pay
2 years	4 " " "
3 "	5 " " "
4 "	6 " " "
5 "	7 " " "
6 "	8 " " "
7 "	9 " " "
8 "	10 " " "
9 "	11 " " "
10 " or more	12 " " "

243

In determining the full pay of employees any allowance or payments for overtime shall not be included.

B. ANNUITANTS.

The amount of death benefits payable under this section of the plan to the beneficiaries of annuitants retiring on or after July 1, 1919, subject to the conditions and exceptions hereinafter pro-

Findings of Fact and Conclusions of Law.

vided, shall be equal to 12 months' full pay at the rate which the annuitant was receiving at the time of his death.

SECTION 3. METHOD OF PAYMENTS.

245 A. All employees and all annuitants retiring on or after July 1, 1919, shall immediately designate in writing the name of the beneficiary or beneficiaries to whom the death benefits are to be paid and file same with the Company. Any such employee or annuitant shall have the privilege of revoking such designation or changing it at discretion by filing such revocation or new designation with the Company. If the name of no beneficiary shall have been filed or, if filed, the death of such beneficiary precedes the death of such employee or annuitant, such death benefits shall lapse, it being the intention of this plan that no one, except such designated beneficiary or beneficiaries surviving such employee or annuitant, shall have any claim for or be entitled to such death benefits or any part thereof.

246

B. Payments of death benefits to beneficiaries designated by the decedent and entitled thereto, as herein provided, shall be made monthly by check payable to the order of such beneficiaries.

SECTION 4. DEDUCTION ON ACCOUNT OF LIABILITY UNDER COMPENSATION OR OTHER LAWS.

Should this Company be liable to make payments to the estate or dependents of any deceased employee, or to any other person, under any State

Findings of Fact and Conclusions of Law.

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or Federal Compensation statute or other law making the Company liable because of the death of the employee, the amount which the Company is obligated to pay on account of said death will be deducted from the amount which would otherwise be payable to the beneficiaries hereunder, and in such case no payment will be made under this plan until the extent of such liability is determined.

PART FOUR: GENERAL RULES.

248

SECTION 1. LENGTH OF SERVICE.

In reckoning the term of service of an employee, credit shall be given for the time of continuous active service:

First: With the Standard Oil Company of New York;

Second: With any company, or a subsidiary of any company, which is or has been owned or controlled by the Standard Oil Company of New York, both prior to and during the period of such ownership or control;

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Third: With any company which shall be or has been merged with, or whose assets shall be or have been acquired by the Standard Oil Company of New York, or by any of its subsidiaries, or which is a subsidiary or predecessor of, or has been merged with any such company;

Fourth: With the Standard Oil Company (incorporated in New Jersey), or any company owned

Findings of Fact and Conclusions of Law.

or controlled by said Standard Oil Company (incorporated in New Jersey), prior to the dissolution in 1911, and which employee as a result of adjustments and transfers immediately following such dissolution became an employee of the Standard Oil Company of New York or of any company owned or controlled by it.

SECTION 2. OTHER PROVISIONS.

251

The annuities and benefits herein provided for are voluntary grants by the Company and this plan shall not be construed as giving any employee the right to be retained in the service of the Company, or any right or claim to an annuity or death benefits to his beneficiaries after discharge from the service of the Company.

The Company reserves the right at any time at its discretion to withdraw or modify this plan, either as to annuities or death benefits.

252

Death benefits will be paid in accordance with the plan as it is in effect at the date of the death of the employee or annuitant.

When once an annuity has accrued and been granted as a regular allowance, it will be continued for the life of the annuitant, subject, however, to the provisions of this plan as it is in effect at the time such annuity is granted.

The above plan is to go into effect as of July 1, 1926.

9. That said Henry C. Folger thereafter, and prior to the commencement of this action, became

Findings of Fact and Conclusions of Law.

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an annuitant under said Plan for Annuities and Insurance by his retirement from the said Standard Oil Company of New York on February 29, 1928, and under and by virtue of said plan he was entitled to designate in writing the name of a beneficiary or beneficiaries to whom death benefits were to be paid.

10. That at the time of his death, Henry C. Folger was receiving an annuity of \$81,500, payable in equal monthly installments, and had designated his wife, Emily C. J. Folger, as the beneficiary to whom death benefits were to be paid, and that after his death, and on the first day of each and every month commencing August 1, 1930, pursuant to such plan and designation, said Emily C. J. Folger received from said Standard Oil Company of New York, as a death benefit under said plan, in equal monthly installments, the total sum of \$81,500, being an amount equal to an annuity for one year.

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11. That the Commissioner of Internal Revenue, in making his determination of the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended, included as part of the gross and net estates of said Henry C. Folger, the sum of \$79,791.63, being the value properly determined as of the date of the death of said Henry C. Folger of the right to receive said death benefit of \$81,500 in equal monthly instalments for twelve months.

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12. That the death benefit did not constitute property of Henry C. Folger during his lifetime.

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Findings of Fact and Conclusions of Law.

13. That Henry C. Folger made no expenditure for the purpose of having the death benefit pass to another upon his death.

14. That Henry C. Folger made no transfer of the death benefit.

15. That the death benefit did not constitute insurance taken out by Henry C. Folger upon his own life.

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(B) AS TO TAX ON WHOLE OF JOINT ESTATE.

258

16. That at the time of the death of Henry C. Folger, he and Emily C. J. Folger were the joint owners of shares of stock in certain corporations held in joint accounts as joint tenants and not as tenants in common nor as tenants by the entirety under and pursuant to the laws of the State of New York; that the entries registering such shares of stock upon the books of the corporations issuing the same were made while both Henry C. Folger and Emily C. J. Folger were residents of the State of New York; that Henry C. Folger and Emily C. J. Folger were residents of the State of New York continuously from prior to 1900 to the dates of their deaths in 1930 and 1936 respectively.

17. That (a) the names of the corporations whose stock was held at the date of death of Henry C. Folger, in such joint tenancies created prior to September 9, 1916, (b) the dates on which the joint accounts were created in the stock of such corporations, (c) the number of

Findings of Fact and Conclusions of Law.

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shares held in such joint accounts immediately prior to September 9, 1916, and (d) the number of shares held in such joint accounts on the date of death of Henry C. Folger, were as follows:

<i>Corporation</i>	<i>Date Joint Account Created</i>	<i>Shares held prior to 9/9/16</i>	<i>Shares held at date of death</i>	
Indiana Pipe Line Com- pany	2/ 5/15	1	3	260
New York Transit Com- pany	2/ 5/15	1	2	
Northern Pipe Line Com- pany	2/ 5/15	1	1	
The Ohio Oil Company.	7/13/14	1075	4300	
The Prairie Oil and Gas Company	7/20/14	165	1680	
The Prairie Pipe Line Company	2/ 9/15	84	1260	
The Solar Refining Com- pany	2/ 6/15	1	8	
South Penn Oil Company	6/ 2/14	20	192	
Standard Oil Company (California)	7/16/14	2095½	24730	261
Standard Oil Company (Indiana)	4/17/14	403	10440	
The Standard Oil Com- pany (Kansas)	3/19/15	1	16	
Standard Oil Company (Nebraska)	2/ 9/15	2	36	
Standard Oil Company (N. J.)	5/19/14	825	12250	
Standard Oil Company of New York	5/29/14	676	8265	
Swan Finch Oil Corpora- tion	4/30/20	0	4	
Swan Finch Oil Corpora- tion (preferred)	9/ 3/29	0	1	

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Findings of Fact and Conclusions of Law.

All of the stock so held was common stock except where stated to the contrary.

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18. That the names of the corporations whose stock was so owned, the market value at the date of the decedent's death and the number of shares of each kind of stock, the names in which the shares were registered and the forms of registration are found to be correctly set forth in Exhibit "B" annexed to the complaint herein which was verified August 27, 1935.

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19. That the number of shares shown as held in such joint tenancies prior to September 9, 1916, the date of the first passage of any Federal Estate Tax Law, were increased to the number of shares held at the date of death of Henry C. Folger by the receipt of shares resulting (a) from the splitting up of the shares into which the capital of the corporation was divided so as to increase the number thereof, and (b) by the receipt of shares issued as stock dividends, and in no other way, except that 1248 shares of stock of Standard Oil Company (California), 1170½ shares of stock of Standard Oil Company (N. J.) and 5 shares of Swan Finch Oil Corporation were purchased for cash by Henry C. Folger, all of which is accurately set forth in detail in "Exhibit C" annexed to plaintiff's complaint.

20. That all of the stocks in the said joint accounts in the names of "Henry C. or H. C. Folger and Emily C. J. Folger, or the survivor" are either (1) stock which was the property of the decedent, originally registered in his name, which

Findings of Fact and Conclusions of Law.

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was transferred by him to the joint account; or (2) stock purchased by the decedent and registered in the said joint names in the first instance; or (3) stock purchased by the decedent and given by him to Emily C. J. Folger, registered in her name, and subsequently transferred to the joint account by her; or (4) the proceeds of stock dividends or the exercise of stock rights and increases by split-ups which were derived from stock of the preceding three classes.

266

21. That the value as of the date of the death of Henry C. Folger of the shares attributable to the cash paid after September 9, 1916, for stock purchased, was \$166,641.87 and the death value of all of the shares held in such joint tenancies was \$3,773,661.06, leaving \$3,607,019.19 as the death value of the shares attributable to the stock held prior to September 9, 1916, which shares will hereinafter be sometimes referred to for convenience as the "Original Stock."

22. That said Original Stock at the date of the death of Henry C. Folger was held by Henry C. Folger and Emily C. J. Folger as joint tenants and not as tenants in common nor as tenants by the entirety.

267

23. That the Commissioner of Internal Revenue in making his determination of the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended, included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06, representing the whole value as of the date of

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Findings of Fact and Conclusions of Law.

death of the said shares of stock jointly owned by Henry C. Folger and Emily C. J. Folger, without deducting, in accordance with the claim of the estate of Henry C. Folger, the sum of \$1,803,509.59, representing one-half of the sum of \$3,607,019.19, the value as of the date of the death of said Original Stock.

(C) AS TO THE PART OF THE JOINTLY OWNED
PROPERTY TRANSFERRED TO THE JOINT TENANCY
269 BY THE SURVIVING JOINT TENANT.

24. That prior to May 29, 1912, Emily C. J. Folger acquired 251 shares of the capital stock of the Standard Oil Company of New York, which shares were given to her by the decedent, Henry C. Folger, and were registered in said Emily C. J. Folger's individual name on the books of said company.

270 25. That on February 9, 1916, Emily C. J. Folger transferred to one of said joint accounts 250 of the said 251 shares of the stock of the Standard Oil Company of New York from her individual account; the Original Stock so transferred had a market value of \$126,791.14 at the date of the death of the decedent, Henry C. Folger.

26. That prior to March 10, 1914, Emily C. J. Folger acquired 656½ shares of the capital stock of the Standard Oil Company (California), which shares were given to her by the decedent, Henry C. Folger, which stock was registered in said Emily C. J. Folger's individual name on the books of said company.

Findings of Fact and Conclusions of Law.

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27. That on the dates hereinafter set forth, Emily C. J. Folger transferred to another of said joint accounts the said 656½ shares of the capital stock of the Standard Oil Company (California) as follows: On February 9, 1915—1½ share, and on February 24, 1916—656 shares; that Emily C. J. Folger transferred said shares from her individual account to the said joint account; said Original Stock had a market value of \$719,981.01 at the date of the death of the decedent, Henry C. Folger.

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28. That the transfers referred to in paragraphs "22", "23", "24" and "25" hereof are shown by items 13 and 16 of Exhibit "C", annexed to the complaint, and the market value thereof also appears in said Exhibit "C".

29. That no consideration in money or money's worth was ever paid to the decedent, Henry C. Folger, by Emily C. J. Folger, for any of the said stock in the joint account.

273

30. That the Commissioner of Internal Revenue, in making his determination of the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended, included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06, representing the value as of the date of death of all the stock held in the joint accounts, as aforesaid, without deducting, in accordance with the claim of the Estate of Henry C. Folger, the amount of \$846,772.15, representing the value, at

274 *Findings of Fact and Conclusions of Law.*

the date of death of the said Henry C. Folger, of the Original Stock transferred to the joint accounts by Emily C. J. Folger.

(D) TAX PROCEEDINGS.

275 31. That pursuant to the provisions of the Revenue Act of 1926 and the amendments thereto, Emily C. J. Folger, as such Executrix as aforesaid, on or about June 8, 1931, made and executed the return for the estate tax on the estate of Henry C. Folger, deceased, on form No. 706, furnished by the defendant, the Collector of Internal Revenue for the First District of New York, for that purpose, and filed the same in duplicate on or about June 10, 1931, in the office of said defendant, the Collector of Internal Revenue for the First District of New York.

276 32. That on or about June 10, 1931, Emily C. J. Folger, as such Executrix as aforesaid, paid to the Collector of Internal Revenue for the First District of New York, as and for estate tax, \$43,611.18, the amount indicated as due with respect to the net estate deemed by her to be shown upon the face of said return less a credit of 80% thereof for state inheritance taxes.

33. That the net estate deemed by Emily C. J. Folger as such Executrix as aforesaid to be shown upon the face of said return amounted to \$2,814,144.52.

34. That on or about May 3, 1933, the Commissioner of Internal Revenue reviewed and audited said return and made certain increases in the

Findings of Fact and Conclusions of Law.

277

amount of the estate of Henry C. Folger, deceased, and imposed an additional assessment against said estate, which increased the amount of the net estate to \$4,891,646.99 by adding to the amount of the net estate deemed by Emily C. J. Folger, as such Executrix as aforesaid, to be shown upon the face of the return the amounts, among others, (a) of the death benefit from the Standard Oil Company of New York heretofore referred to, amounting to \$79,791.63, and (b) of an additional one-half of the value of the Original Stock jointly owned under a tenancy created prior to the passage of any Federal estate tax law, heretofore referred to, amounting to \$1,803,509.59.

278

35. That the Commissioner of Internal Revenue, in assessing an additional estate tax based upon said increase in the amount of the net estate, credited against said estate tax to the extent of 80% thereof the amount of state, estate, inheritance, legacy and succession taxes which had been paid in respect of property included in the gross estate.

279

36. That the tax so assessed as aforesaid upon a basis arrived at by including such increase and after giving effect to such 80% credit amounted to \$54,054.94, of which the sum of \$49,765.82 resulted from the inclusion of the death benefit paid by the Standard Oil Company of New York to Emily C. J. Folger, amounting to \$79,791.63, and of an additional one-half of the value of the Original Stock jointly owned under a tenancy created prior to the passage of any Federal estate tax law, amounting to \$1,803,509.59.

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Findings of Fact and Conclusions of Law.

37. That on or about May 3, 1933, the defendant, Walter C. Corwin, Collector of Internal Revenue for the First District of New York, demanded of the said Emily C. J. Folger, as such Executrix as aforesaid, payment of said sum of \$54,054.94, with interest thereon from June 11, 1931, to April 26, 1933, amounting to \$6,077.85, all as and for a claimed estate tax with interest thereon.

281

38. That on or about May 17, 1933, Emily C. J. Folger, as such Executrix as aforesaid, paid to the defendant, Walter C. Corwin, Collector of Internal Revenue for the First District of New York, the sums of \$54,054.94, and \$6,077.85, as interest thereon to April 26, 1933, in response to said demand.

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39. That on or about July 8, 1933, Emily C. J. Folger, as such Executrix as aforesaid, filed with the defendant Walter C. Corwin, Collector of Internal Revenue for the First District of New York, on form 843 furnished by the defendant, a claim for the refund of the principal sum of \$52,035.41, and the interest, paid upon the same, of which principal sum the amount of \$49,765.82 represented the tax on the items mentioned in paragraph 36 hereof; on September 12, 1933, the Commissioner of Internal Revenue rejected the said claim and this action was commenced within two years after such rejection.

(E) AS TO DEFENDANT'S FIRST AFFIRMATIVE
DEFENSE.

40. That the funds sought to be recovered herein were collected by the defendant, Walter C. Corwin, in his official character as Collector of In-

Findings of Fact and Conclusions of Law.

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ternal Revenue for the First District of New York, from the estate of Henry C. Folger, deceased; that said funds were paid by defendant, as such Collector of Internal Revenue, into the Treasury of the United States.

41. That in collecting the sum of \$55,361.41, defendant acted under the directions of the Commissioner of Internal Revenue, a proper officer of the government, who made an additional assessment of estate tax against the estate of Henry C. Folger, deceased, and directed defendant to collect such additional estate tax.

284

42. That there was probable cause for defendant's act of collecting the said sum of \$55,361.41 as additional estate tax and interest from the estate of Henry C. Folger.

(F) AS TO DEFENDANT'S SECOND AFFIRMATIVE
DEFENSE.

43. That in the Federal estate tax return filed by Emily C. J. Folger, as Executrix of the estate of Henry C. Folger, deceased, on June 10, 1931, with defendant, a gross estate of \$15,602,729.24, and deductions of \$12,788,584.72, were reported, resulting in a net estate of \$2,814,144.52.

285

44. That thereafter the Commissioner of Internal Revenue made an audit and review of said estate tax return and fixed the total value of decedent's gross estate at \$15,359,827.69, allowed deductions of \$10,468,180.70, and determined a net estate of \$4,891,646.99.

Findings of Fact and Conclusions of Law.

45. That in determining said net estate, the said Commissioner allowed a total deduction on account of decedent's bequests to charity of \$6,396,898.00.

46. That after the death of Henry C. Folger, all persons who under the intestate laws of the State of New York would be entitled to a share of his estate executed written waivers of any objections to the Will of Henry C. Folger, which they may have had under Section 17 of the Decedent Estate Law of New York; that said waivers were dated June 21, 1930, and were embodied in waivers of the issue and service of citations upon the probate of the Will of Henry C. Folger.

47. That the decedent, Henry C. Folger, in his last Will and Testament provided in part as follows:

(Article Fifth printed at pp. 52-55, inc.)

48. That the bequests made by decedent to The Trustees of Amherst College were bequests to a corporation organized and operated exclusively for charitable purposes as defined in Section 303, subdivision (a) (3) of the Revenue Act of 1926 as amended.

49. That the bequests, on account of which said deduction in the sum of \$6,396,898.00 is allowed, have been or will be paid to The Trustees of Amherst College.

50. That the debts of Henry C. Folger, deceased, at the time of his death amounted to \$3,971,282.61.

CONCLUSIONS OF LAW

DEATH BENEFIT

1. That the death benefit having a value at the date of death of Henry C. Folger of \$79,791.63, which was paid by the Standard Oil Company of New York to Emily C. J. Folger did not constitute property of the decedent Henry C. Folger under Section 302 of the Revenue Act of 1926 as amended, or under subdivision (a) of said section; that Henry C. Folger's act of naming Emily C. J. Folger as the recipient of the death benefit was not a transfer of property by him to her within the meaning of subdivisions (c) or (d) of Section 302 of the Revenue Act of 1926 as amended; that said death benefit did not constitute insurance taken out by Henry C. Folger upon his own life within the meaning of subdivision (g) of Section 302 of the Revenue Act of 1926 as amended.

290

2. That the inclusion of the sum of \$79,791.63 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

291

3. That the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the value of the death benefit in the amount of \$79,791.63 against Emily C. J. Folger as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and was without legal sanction.

4. That the payment of said additional tax, with interest thereon, was exacted of Emily C. J. Folger as such Executrix as aforesaid by defendant illegally and without warrant of law.

AS TO JOINTLY-OWNED PROPERTY

5. That at the time of the death of Henry C. Folger, he and Emily C. J. Folger were the owners of shares of stock, having a value as of the date of death of \$3,773,661.06, as joint tenants and not as tenants in common nor as tenants by the entirety, under and pursuant to the laws of the State of New York which governed the tenancies and incidents of the tenancies created in such shares of stock.

6. That said joint tenancies to the extent of shares of stock having a value at the date of the death of Henry C. Folger of \$3,607,019.19, hereinafter sometimes referred to as the "Original Stock" were created prior to the enactment of the first Federal Estate Tax Law on September 9, 1916.

7. That on the dates when said joint tenancies in said original stock were created, Henry C. Folger and Emily C. J. Folger each became seized respectively of such shares of stock per my et per tout.

8. That the Commissioner of Internal Revenue properly determined that the value of the stock held in the joint account of "Henry C. Folger and Emily C. J. Folger, or the survivor", of \$3,773,881.06, should be included in the gross and net estates of the decedent for estate tax purposes.

**AS TO THE PART OF THE JOINTLY OWNED PROPERTY
TRANSFERRED TO THE JOINT TENANCY BY THE
SURVIVING JOINT TENANT.**

9. That on or about February 9, 1916, Emily C. J. Folger transferred to one of said joint accounts 250 shares of the capital stock of the

Findings of Fact and Conclusions of Law.

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Standard Oil Company of New York which then belonged to her.

10. That on or about February 9, 1916, Emily C. J. Folger transferred to another of said joint accounts $\frac{1}{2}$ share of the capital stock of the Standard Oil Company (California) which then belonged to her; that on or about February 24, 1916, Emily C. J. Folger transferred to a joint account 656 shares of the capital stock of the Standard Oil Company (California) which then belonged to her.

296

11. That the Original Stock so transferred had a market value at the date of death of Henry C. Folger, deceased, of \$846,772.15.

12. That the Commissioner of Internal Revenue properly determined that no part of the value of the joint account, representing property transferred thereto by Emily C. J. Folger, should be excluded from the gross and net estates, because Emily C. J. Folger received the same from the decedent without giving any consideration in money or money's worth.

297

AS TO DEFENDANT'S FIRST AFFIRMATIVE DEFENSE.

13. That there was probable cause for defendant's act of collecting as additional estate tax and interest thereon the sum of \$55,361.41 from the estate of Henry C. Folger.

14. That the defendant's first affirmative defense is insufficient in law.

AS TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE.

15. That the bequests made by Henry C. Folger, deceased, to The Trustees of Amherst College

298 *Findings of Fact and Conclusions of Law.*

were bequests made to a corporation organized and operated exclusively for charitable purposes as defined in Section 303, subdivision (a) (3) of the Revenue Act of 1926 as amended; that the sum of \$6,396,898 was properly allowed as a deduction by the Commissioner of Internal Revenue in determining the estate tax upon the estate of Henry C. Folger, deceased, and such allowance was valid and according to law.

299 16. That the probate of the Will of Henry C. Folger, coupled with the waivers with respect to rights under Section 17 of the Decedent Estate Law of New York, established once and for all the proportion of the estate going to charity.

17. That the defendant's second affirmative defense is insufficient in law.

JUDGMENT TO WHICH PLAINTIFF IS ENTITLED.

300 18. That plaintiff is entitled to judgment against defendant in the sum of \$2,483.96, with interest thereon from May 17, 1933, together with the costs and disbursements of this action, said sum of \$2,483.96, representing \$2,234.17 tax, and \$249.79 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$79,791.63, being the value of said death benefit.

I direct that judgment be entered accordingly.

Dated, Brooklyn, New York, March 14th, 1938.

MORTIMER W. BYERS,
United States District Judge.

Plaintiff's Requests for Conclusions of Law and Exceptions. 301

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

302

Plaintiff requests the Court to make the follow- 303
ing conclusions of law:

1. That as to the Original Stock held in such joint tenancies referred to in the Court's conclusion number 7, one-half thereof, or shares of a value of \$1,803,509.59, did not constitute part of the gross or net estate of the decedent Henry C. Folger under Section 302 of the Revenue Act of 1926 as amended, or any of the subdivisions of said section.

2. That the inclusion of said sum of \$1,803,509.59 in the gross and net estates of Henry C.

304 *Plaintiff's Requests for Conclusions of Law and Exceptions.*

Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

305 3. That the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the sum of \$1,803,509.59, the amount of an additional one-half of the value of the Original Stock held in such joint tenancies, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and without legal sanction.

4. That the payment of the said additional tax, with interest thereon, was exacted of Emily C. J. Folger, as such Executrix as aforesaid, by defendant, illegally and without warrant of law.

306 5. That the Original Stock transferred as stated in the Court's conclusion number 11 and having a market value of \$846,772.15 did not constitute part of the gross estate of the decedent, Henry C. Folger, within Section 302 of the Revenue Act of 1926 as amended, or any subdivision thereof.

6. That the inclusion of said sum of \$846,772.15 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

7. That the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the value of the

Plaintiff's Requests for Conclusions of Law and 307
Exceptions.

Original Stock so transferred to the joint accounts by Emily C. J. Folger prior to the enactment of any Federal estate tax law in the amount of \$846,772.15, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and was without legal sanction.

8. That the payment of said additional tax, with interest thereon, was exacted of Emily C. J. Folger as such Executrix as aforesaid by defendant illegally and without warrant of law. 308

9. That plaintiff, in addition to the amount of the judgment directed in the Court's conclusion number 18 is entitled to judgment in the sum of \$26,298.45, representing \$23,639.79 tax, and \$2,658.66 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$846,772.15, being the value of Original Stock transferred by Emily C. J. Folger to said joint tenancies, and also being a portion of one-half of the value of the Original Stock, with interest upon said sum of \$26,298.45 from the 17th day of May, 1933. 309

10. That plaintiff, in addition, is entitled to judgment in the sum of \$26,578.88, representing \$23,891.86 tax and \$2,687.02 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$956,737.44, being the remainder of one-half of the value of the Original Stock, with interest upon said sum of \$26,578.88 from the 17th day of May, 1933.

310 *Plaintiff's Requests for Conclusions of Law and Exceptions.*

In the event of a denial by the Court of plaintiff's requests for the foregoing conclusions of law or any part thereof, plaintiff respectfully requests the Court to grant an exception or exceptions to plaintiff.

Plaintiff also respectfully requests the Court to grant exceptions to the conclusions of law numbered 8 and 12 contained in the Court's findings of fact and conclusions of law dated March 14th, 1938.

Respectfully submitted,

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

Exceptions are allowed the plaintiff to the refusal of the Court to pass upon the foregoing requests submitted March 14, 1938 numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and exceptions are also allowed to conclusions of law numbered 8 and 12 contained in the findings of fact and conclusions of law of the Court dated March 14, 1938, this 14th day of March, 1938.

MORTIMER W. BYERS,
United States District Judge.

Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions. 313

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collector of Internal Revenue, First District of New York,
Defendant.

L-6839.

314

Comes now the above named defendant, by Harold St. L. O'Dougherty, Esquire, United States Attorney, his attorney, and considering the same to be material to the proper presentation of this case, respectfully requests the Court to make and enter the following special findings of fact and conclusions of law. 315

I.

That the value as of the date of death of the decedent's gross estate as defined by the Revenue Act of 1926, as amended, less his debts, amount-

316 *Defendant's Request for Special Findings of Fact
and Conclusions of Law and Exceptions.*

ing to \$3,971,282.61, was \$11,388,545.08, and one-half of said amount as of the date of decedent's death was \$5,694,272.54.

II.

317 That the charitable institutions named in the Will of the decedent could not receive the excess over one-half of the estate of the said decedent in the absence of the charitable intent of the widow.

III.

The gift to charity to the extent of the excess over one-half of the estate is in effect one from Emily C. J. Folger and not from the decedent.

CONCLUSIONS OF LAW.

I.

318 That the defendant is entitled to judgment dismissing plaintiff's suit at plaintiff's cost.

II.

That the Commissioner of Internal Revenue properly determined that the value of the death benefit of \$79,791.63 received by Emily C. J. Folger as the named beneficiary of the decedent, should be included in the decedent's gross and net estates.

III.

Upon the facts and evidence in this case, this estate is not entitled to any deduction from the

Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions. 319

decedent's gross estate under Section 303(a) (3) of the Revenue Act of 1926 in excess of one-half of the value of the decedent's estate less his debts.

IV.

Under Section 17 of the New York Decedent's Estate Law, where the testator is survived by a widow, bequests to charity to the extent of the excess over one-half of said estate, less debts, is invalid and voidable. 320

V.

By reason of the right of the widow under Section 17 of the New York Decedent's Estate Law, charity takes the excess over one-half of the estate, less debts, by reason of the charitable intent of the widow rather than by reason of the provisions of the will of the testator.

VI.

321

An outstanding power to void a charitable bequest in part, such as that power in the widow under Section 17 of the New York Decedent's Estate Law, renders the bequest valueless to the extent that it is voidable.

VII.

The amount or value of the bequest must be determined as of the date of the decedent's death

322 *Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions.*

and subsequent events affecting the value such as the waiver by the widow of her rights under Section 17, must be ignored.

VIII.

The limitation upon the charitable bequests as imposed by the New York law is equally as effective as if imposed by the testator's will.

323

IX.

The resulting value of the bequest to charity has the same limitation in value as it would if the interest of the widow was a vested property right.

X.

If charity receives in excess of one-half of the testator's estate, such receipt is actually and essentially the result of the benevolence of the widow in waiving the provisions of Section 17 of the New York Decedent's Estate Law.

324

XI.

Deduction should not be allowed from the decedent's gross estate in excess of one-half of the value of the estate, less debts, by reason of the provisions of Section 17 of the New York Decedent's Estate Law.

In the event of a denial by the court of defendant's requests for special findings of fact and

Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions. 325

conclusions of law or any part thereof, defendant respectfully requests the court to grant an exception or exceptions to defendant.

Defendant also respectfully requests the court to grant exceptions to conclusions of law numbered I, II, III, IV, XIV, XV, XVI, XVII, XVIII contained in conclusions of law of the Court dated March , 1938.

Respectfully submitted, 326

HAROLD ST. L. O'DOUGHERTY,
United States Attorney,
Eastern District of New York.

Exceptions are allowed the defendant to the refusal of the Court to pass upon the foregoing requested Findings of Fact numbered I, II and III and Conclusions of Law numbered I, II, III, IV, V, VI, VII, VIII, IX, X and XI submitted Mar. 14, 1938, and exceptions are also allowed to Conclusions of Law numbered 1, 2, 3, 4, 14, 15, 16, 17 and 18 contained in the findings of fact and conclusions of law of the Court dated, March 14th, 1938, this 14th day of March, 1938. 327

MORTIMER W. BYERS,
United States District Judge.

328

Stipulation and Order Settling Bill of Exceptions.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

329

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

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IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the foregoing bill of exceptions contains all the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the trial, and that the exhibits set forth or referred to, or both, in the foregoing bill of exceptions, constitute all of the exhibits offered in evidence at the said trial, and that the same may be settled and allowed in the form proposed

Stipulation and Order Settling Bill of Exceptions. 331

and submitted, and ordered on file as the bill of exceptions herein.

Dated, New York, N. Y., June /3 , 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff-Appellant.

MICHAEL F. WALSH,
Attorney for Defendant-Appellant,

By VINE H. SMITH, 332
Asst. U. S. Attorney.

Upon the foregoing stipulation of the attorneys for the respective parties hereto, it is hereby

ORDERED, that the foregoing bill of exceptions be and the same hereby is settled and allowed in this cause and it is hereby directed that the same be filed as a part of the record herein.

Dated, New York ^{Brooklyn} N. Y., June /4th , 1938.

MORTIMER W. BYERS, 333
U. S. D. J.

334

Opinion of Court.**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

335

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839

April

14, 1937.

336

HAWKINS, DELAFIELD & LONGFELLOW, Esq's., attor-
neys for plaintiff (E. J. Dimock, C. O. Dona-
hue, A. F. Strashburger, Jr., and J. D. Rawl-
ings, Esqs., of counsel).

LEO J. HICKEY, Esq., United States Attorney, at-
torney for defendant (James W. Morris, Esq.,
Asst. Attorney General, Andrew D. Sharpe
and Clarence E. Dawson, Esqs., Special As-
sistants to Attorney General, and John G.
Dalton, Esq., Asst. U. S. Attorney, of coun-
sel).

BYERS, D. J.:

This is an action at law in which recovery is
sought of certain alleged overpayments of Federal
estate taxes in connection with the estate of Henry
C. Folger, deceased.

Opinion of Court.

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The decedent died on June 11, 1930, a resident of this district and on June 10, 1931, his executrix filed a Federal estate tax return; these issues concern certain contested items, as to all of which the tax was paid under protest; recovery as to them is now sought.

There are no issues of fact, and the evidence is to be found in the pleadings and stipulations of facts, corporate records concerning the issuance of the stock hereinafter referred to, and sundry stock certificates.

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The questions may be conveniently stated as follows:

I. Was the death benefit paid by the Standard Oil Company of New York to Mr. Folger's wife part of his estate and taxable as such?

The answer turns upon the construction applicable to a "Plan for Annuities and Insurance as amended, effective July 1, 1926", promulgated by the Standard Oil Company of New York, of which the decedent was an employee and officer for many years. It has to do with annuities payable to employees who become eligible for retirement or annuity upon reaching a certain age and after having rendered a stated term of service to the Company.

339

Part Two, Section 2, deals with the amount of payments upon retirement and the method; it is not disputed that the decedent was in receipt of such an annuity following his retirement, which occurred on February 29, 1928, namely, the sum of \$81,500.00 per year, payable in equal monthly instalments. No question arises in reference to that aspect of the plan.

340

Opinion of Court.

Issue is made, however, with reference to a death benefit treated in Part Three, the pertinent provisions of which are:

"Section 1. Eligibility.

341

"The beneficiaries of all employees of one year's continuous active service and the beneficiaries of all annuitants retiring on or after July 1, 1919, shall without contribution on their part be eligible to death benefits in accordance with and subject to the conditions and exceptions of the following plan:"

(The maximum benefit was twelve months' full pay, which applied in this case.)

"Section 2, Subdivision B. Annuitants.

342

"The amount of death benefits payable under this section of the plan to the beneficiaries of annuitants retiring on or after July 1, 1919, subject to the conditions and exceptions hereinafter provided, shall be equal to 12 months' full pay at the rate which the annuitant was receiving at the time of his death."

"Section 3. Method of Payments.

"A. All employees and all annuitants retiring on or after July 1, 1919, shall immediately designate in writing the name of the beneficiary or beneficiaries to whom the death benefits are to be paid and file same with the Company. Any such employee or annuitant shall have the privilege of revoking such designation or changing it at discretion by filing

Opinion of Court.

343

such revocation or new designation with the Company. If the name of no beneficiary shall have been filed or, if filed, the death of such beneficiary precedes the death of such employee or annuitant, such death benefits shall lapse, it being the intention of this plan that no one, except such designated beneficiary or beneficiaries surviving such employee or annuitant, shall have any claim for or be entitled to such death benefits or any part thereof."

344

"Section 4. Deduction on Account of Liability Under Compensation or Other Laws.

"Should this Company be liable to make payments to the estate or dependents of any deceased employee, or to any other person, under any State or Federal Compensation statute or other law making the Company liable because of the death of the employee, the amount which the Company is obligated to pay on account of said death will be deducted from the amount which would otherwise be payable to the beneficiaries hereunder, and in such case no payment will be made under this plan until the extent of such liability is determined."

345

"PART FOUR: GENERAL RULES."

"Section 2. Other Provisions.

"The annuities and benefits herein provided for are voluntary grants by the Company and this plan shall not be construed as giving any employee the right to be retained in the service of the Company, or any right or claim

to an annuity or death benefits to his beneficiaries after discharge from the service of the Company.

"The Company reserves the right at any time at its discretion to withdraw or modify this plan, either as to annuities or death benefits.

"Death benefits will be paid in accordance with the plan as it is in effect at the date of the death of the employee or annuitant.

"When once an annuity has accrued and been granted as a regular allowance, it will be continued for the life of the annuitant, subject, however, to the provisions of this plan as it is in effect at the time such annuity is granted."

The decedent had designated his wife, Emily C. J. Folger, as the beneficiary to whom should be paid the death benefit contemplated by the plan, and commencing August 1, 1930, she duly received in twelve equal monthly instalments the total sum of \$81,500.00 pursuant to said plan.

The value of the last-named sum at the time of the death of the decedent was \$79,791.63, which the Commissioner of Internal Revenue included as part of the gross and net estates of the said decedent, and the legality of such inclusion now requires determination.

The applicable statute is the Revenue Act of 1926, Section 302, which reads:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all prop-

erty, real or personal, tangible or intangible, wherever situated.

“(a) To the extent of the interest therein of the decedent at the time of his death.”

It is argued for the defendant that “Mr. Folger’s death was the generating source of an important benefit to his beneficiary and the value of that benefit at the date of his death should be included” as was done; that “this statute fully contemplates the inclusion of a payment of this nature.” 350

The precise property of the decedent is asserted to have been his right—which was exercised—“to designate the beneficiary of his death benefit.”

It becomes necessary to inquire then as to the constituency of that privilege which pertained to the decedent, in order to ascertain whether it conformed to any recognized definition or understanding of what the law knows as property.

The inquiry is not illuminated by judicial construction of this statute, but under date of March 8, 1937, Vol. XVI, No. 10, of the Internal Revenue Bulletin contains an opinion of Chief Counsel for the Bureau of Internal Revenue which is flatly opposed to the defendant’s contention. The cases of *McNevin v. Solvay Process Co.*, 53 N. Y. Supp. 98; *Dolge v. Dolge*, 75 N. Y. Supp. 386 and *Burgess v. First National Bank*, 220 N. Y. Supp. 134, are cited to vindicate the view that under a comparable state of facts “* * * it is clear that the decedent’s interest in the death benefit prior to his death was nothing more than an expectancy, which is not a property right and, therefore, not includible in his gross estate under Section 302 (a) as amended”. 351

352

Opinion of Court.

It was further the opinion that the death benefit did not constitute insurance under Section 302 (g), i. e.:

353

"The liability of the M company for the payment of the death benefit to the beneficiary designated by the decedent did not arise until the death of the decedent. Consequently, the decedent had no contractual or vested right in the death benefit during his lifetime."

The foregoing views have been formulated with care, and require consideration on this branch of the case.

The defendant's argument is that, when the decedent designated his wife to receive the benefit, "he transferred to her his beneficial interest in the plan which was intended to take effect in enjoyment at his death."

354

The foregoing betrays a complete misunderstanding of the difference between the annuity payable to Mr. Folger, and the death benefit payable to his wife. As to the latter, he was possessed of nothing during his life, save the capacity to nominate a person to whom, upon his death, the company could grant a sum called a death benefit. Any nomination which he might make was revocable by him; which means that he could substitute any number of persons in turn, depending upon his own notions. What he could not control, however, was the capacity of a nominee to qualify as a recipient, by surviving him. Thus it would have been possible for Mrs. Folger's death to occur prior to his, but under circum-

stances not affording him an opportunity to nominate some one in her place. If that had happened, exercise of the privilege to nominate would have failed to bring about the payment of a death benefit to any person at all.

It is no answer to say that, because these things did not occur, resort may not be had to the reflection that they were possible, because the nature of the capacity which pertained to the decedent must be so understood, in the process of determining whether it is fairly to be classified as property and taxable as such. 356

The distinction between a power of appointment, or the power to change a beneficiary named in a life insurance policy, and such a privilege as was accorded to this decedent under the terms of the plan, stands clearly revealed in the light of what has been written. Under either of the former, a fund or estate passes to some one in possession, as the result of the exercise of the power.

Here nothing may be payable, if the named beneficiary predeceases the annuitant, but since a payment did accrue, because the annuitant named a surviving beneficiary, that result is to be traced not to a transfer of anything from Mr. Folger to his wife, but to the circumstance that the annuity which he had enjoyed became extinct through his death, and a new relation came into existence between the company and Mrs. Folger. 357

The right to nominate or designate the person to receive the death benefit could not have been levied upon to satisfy a judgment against the decedent during his lifetime; had he become bankrupt, his trustee could not have realized anything thereon for creditors, nor could it have been sold

Opinion of Court.

or assigned by the decedent because it was merely a privilege extended to him by his employer, which was subject to withdrawal or modification at any time, under the quoted terms of the plan.

The cases cited by defendant are: *Klein v. U. S.*, 283 U. S. 231; *Chase National Bank v. U. S.*, 278 U. S. 327, and *Saltonstall v. Saltonstall*, 276 U. S. 260. The first determines that the grantor of certain real estate created a life estate for his wife, and by the same instrument, a contingent remainder in fee. Since the event upon which the latter would have become vested did not occur, an estate tax under an earlier statute, upon the value of the property, less the value of the life estate, was sustained. This case presents issues entirely alien to those under examination.

The second case has to do with Section 402 (f) of the Act of 1921 which affected life insurance policies in excess of \$40,000.00 upon the life of the decedent. That section, or its successor under the 1926 Act, is not presently involved.

The opinion is most instructive in pointing out the process leading to the conclusion that a transfer tax, as distinguished from a succession tax, applied to the power which that decedent possessed to change beneficiaries: "Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

Touching the argument that the proceeds of the policies were payable by the insurer, and not the

decendent, thus excluding a *transfer*, the court says: "Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."

These quotations are permissible to expose the precise inapplicability of the reasoning touching the taxable susceptibility of insurance policies, to the death benefit under the plan here presented. 362

There was no gift which Mr. Folger could either make or recall; he made no expenditure with the purpose, effected at his death, of having property pass to another.

The third case involved a succession tax under Massachusetts law which was held to have been properly assessed. It has no bearing upon this controversy.

It is concluded as to the first question, that there pertained to Mr. Folger, during his life, only the right to render it possible for Mrs. Folger to receive a grant from the Standard Oil Company, and that this did not constitute property of his under Section 302 of the law, or subdivision (a), and that the act of naming her as the recipient of the death benefit was not a transfer of property by him to her, so as to fall within subdivisions (c) or (d). 363

II. Was the property of Mrs. Folger in stocks jointly owned by her and her husband, properly included in the computation of the estate tax payable upon his estate?

Opinion of Court.

364

The facts concerning this branch of the case are:

The decedent and his wife were joint tenants of very considerable holdings of various Standard Oil stocks, the details concerning which have been stipulated according to Exhibit C, annexed to the complaint. .

365

The joint estate was constituted on or about May 1, 1916, which was prior, by over four months, to the enactment of the first Federal Estate Tax Law. Thereafter there were substantial accretions to this joint estate, as the result of stock dividends, split-ups, and the exercise of rights to subscribe. As to the latter, it is the value of the rights only which is asserted to have been improperly assessed.

The valuation of the joint estate as at the decedent's death is not in issue, but the contention is that but one-half thereof should have been included in fixing the amount payable for the purposes of the estate tax.

366

The applicable paragraphs of Section 302 of the law follow:

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full considera-

Opinion of Court.

367

tion in money or money's worth; Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants; * * *

368

“(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.”

369

If the assessment had been made with reference to real estate held by Mr. and Mrs. Folger, as tenants by the entirety, its validity would not be

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open to question, *Third National Bank & Trust Co. v. White*, 287 U. S. 577, even though the creation of the estate preceded the passage of the Federal Estate Tax statute.

Knox v. McElligott, 258 U. S. 546, does not avail the plaintiff here, even though a joint estate was involved in that case which had been created in 1912. The assessment there reviewed and set aside was upon the whole joint estate and was based upon the Act of September 8, 1916, which
371 did not contain such a provision as subdivision (h) of Section 302 of the 1926 Act here presented. That decision is still the law: *Cahn v. U. S.*, 297 U. S. 691.

The validity of a tax upon the entire value of property held in entirety, upon the death of one of the tenants, was sustained in *Tyler v. U. S.*, 281 U. S. 497, where the estates had been created subsequent to the effective date of the 1916 Act.

The plaintiff rests his contentions upon the assertion that there is such a difference, in the legal sense; between a joint estate and an estate by the
372 entirety, that decisions affecting the latter should not be deemed to control in the case of a joint tenancy.

Such interests were present in the two following cases:

Gwinn v. Commissioner, 287 U. S. 224—One-half of a joint estate in land, created in 1916, was held to have been properly included in an assessment laid under the 1924 law.

There had been no assessment upon the entire joint estate which was later reduced to one-half, as in *Griswold v. Helvering*, 290 U. S. 56, which involved a joint estate in land, created in 1909.

The court considered an objection based upon the alleged retroactive effect which was given to the law, and disposed of it tersely upon the ground that cessation of the interest of the deceased joint tenant "presented the proper occasion for the imposition of a tax. See *Gwinn v. Commissioner*, 287 U. S. 224, and cases cited."

The statute involved was Section 402 of the 1921 law, subdivision (d), reading: "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person * * *." 374

Apparently the plaintiff's argument is that, because the inclusion of the moiety pertaining to the deceased joint tenant, in fixing the taxable value of his estate for the purpose of the estate tax, has been found proper, that course should have been followed in this case; which means that the inclusion of his interest in the whole estate, i. e., what he held "per tout", has not been sanctioned, and should now be disapproved.

That there is a difference in the legal aspect of the two estates has been recognized, since during the joint lives there may be a severance in the case of a joint tenancy, but not in an estate by the entirety, according to the decisions of the New York courts which are controlling: *Matter of Sutter*, 258 N. Y. 104; *Matter of Klatzel*, 216 N. Y. 83. 375

Had there been a severance in this case, it may be assumed that a tenancy in common would have been brought about, and the present issue would not have arisen.

So much of the argument as is based upon the objection to retroactive taxation, and the cases of *Nichols v. Coolidge*, 274 U. S. 531; *Helvering v.*

Helmholz, 296 U. S. 93, and *White v. Poor*, 296 U. S. 98, seems not to apply for the reason that the death of one joint tenant is the means whereby the consummation of the other's undefeasible title is accomplished, and it is that process which is taxable, without regard to the fact that its potential operation was a vital thing resting upon a legal foundation laid prior to the first taxing statute.

377 If such is the teaching of the *Tyler* case, *supra*, it is not perceived how there is any difference in principle between a joint estate, and an estate by the entirety, for present purposes.

The cessation of the seizure "per tout" on the part of Mr. Folger removed that element in Mrs. Folger's tenancy which was present so long as he lived, and did not differ in texture but in area from his seizure "per my", and the reasoning which validated the assessment of the latter would be equally persuasive when applied to the former.

The assessment therefore must be upheld, subject to examination of the next contention.

378 III. The next question concerns so much of the joint estate as was the sole property of Mrs. Folger at the time of the creation of the joint estate, and constituted her contribution thereto.

She had received these shares in two corporations in 1913 and 1914 as gifts from her husband, and the query is as to the propriety of their inclusion in this assessment.

Subdivision (e) of Section 302 already quoted, as to the following, is thus brought into question:

"(e) * * *, except such part thereof as may be shown to have originally belonged to such other person (Mrs. Folger) and never to have

been received or acquired by the latter from the decedent (her husband) for less than an adequate and full consideration in money or money's worth * * *."

It is clear that, if Mrs. Folger had owned the shares by virtue of a gift of them from her father for instance, they would have been excluded from the assessment. But the fact is that the gift was from her husband.

The joint estate was created in 1916 as has been said, a few months prior to the adoption of the estate tax. The chances are that the purpose of Mr. and Mrs. Folger was not entirely unrelated to the possible enactment of such legislation.

380

It is said in *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160, a case under the 1924 statute, that language such as is above quoted had been present in the successive revenue acts, beginning with the 1916 law.

This means that the purpose of Congress to impose such a tax, under the circumstances stated in the statute, has been clearly revealed for over ten years, without having resulted in any construction which would limit its application, where one joint tenant contributes to the joint estate what has been received as a gift from the other, to cases in which the joint estate was created after the enactment of the law.

381

When it is considered that the entire joint estate of the decedent is taxable, the possible exemption of a designated element is a voluntary relinquishment by the government of such part of the tax as to it seems fair, and any construction of the exemption must be strict as against the taxpayer.

Opinion of Court.

382

In other words, the absence of any expression to qualify the provision that such exemption attaches only to that which is shown "never to have been received", etc., excludes any latitude of construction. There is no ambiguity about the word "never".

383

The plaintiff relies on *Heiner v. Donnan*, 285 U. S. 312, and *Lewellyn v. Frick*, 268 U. S. 238, but the points at issue in those cases are not here presented. In the first, the two-year period for presuming gifts *inter vivos* to have been made in contemplation of death, was ruled to be unconstitutional; and in the second, life insurance policies written many years prior to the 1916 law were held not to have been within the reach of the 1919 provisions of the law touching insurance in excess of \$40,000.00.

The retroactive argument has been considered and found to be unavailing in the light of authoritative decisions, and that is conclusive upon the whole as well as on each part of the joint estate.

384

The third question is resolved in favor of the defendant.

The final issue has to do with the affirmative defense, that because the decedent's estate has received the benefit of a deduction for charitable bequests in excess of one-half of the entire estate, notwithstanding Section 17 of the Decedent's Estate Law of New York, there can be no recovery of any part of the taxes paid.

The argument is that, despite the waiver by Mrs. Folger and the decedent's next of kin of any interest which by virtue of that law any of said persons might otherwise have had in any of the decedent's property, and the respective acceptances

Opinion of Court.

385

as the sole interest in his property of the disposition made in Mr. Folger's will, on the part of each of said persons, the proportion of the estate covered by charitable bequests was uncertain, contingent and not determined when the assessment was made. These waivers were executed on June 21, 1930, and were embodied in waivers of the issue and service of citations upon the probate of the will.

The assessment in question was made not less than one year thereafter.

386

The probate of the will under the circumstances related, coupled with the waivers with respect to the rights under Section 17 of the Decedent's Estate Law, established once and for all the proportion of the estate going to charity (See *Humphrey v. Millard*, 79 Fed. [2d] 107) and the exemption from Federal estate tax as to such portion of the estate, allowed by the Commissioner, was informed, deliberate and final.

The case cited is even stronger than this on the facts, because there the widow possessed the testamentary right to invade principal.

The affirmative defense is without legal basis to sustain it.

387

Judgment is ordered for plaintiff as to so much of the tax as represents the assessment made in connection with the death benefit only, to be settled on notice.

M. W. B.,
U. S. D. J.

388

**Memorandum of Court as to Findings and
Conclusions.**

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

389

**EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,**

Plaintiff,

against

L-6839.

**WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.**

February 8, 1938.

390

**HAWKINS, DELAFIELD & LONGFELLOW, Esqs., attor-
neys for plaintiff.**

**HAROLD ST. L. O'DOUGHERTY, Esq., United States
Attorney, attorney for defendant.**

MEMORANDUM.

BYERS, D. J.

Counsel will please draw one set of findings and conclusions to conform to the opinion of April 14, 1937.

I do not feel called upon to specifically refuse to make findings or conclusions that are contrary to the decision, in the absence of citation of authority binding upon me, to the effect that otherwise the appeal of either party will be ineffective. See Equity Rule 11 of this court.

Judgment.

391

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

392

No. L-6839.

The issues in this action having been duly brought on for trial before Hon. Mortimer W. Byers, United States District Judge, at a term of this Court held in and for the Eastern District of New York at the United States Court House in the Borough of Brooklyn, City and State of New York, on the 17th day of November, 1936, and the parties having duly stipulated that a trial by jury be waived and that the case be tried and determined by the Court without a jury, and all parties having appeared, and the Court having heard the allegations, proofs and arguments of the respective parties, and after due deliberation, having duly made and filed its decision in writing

393

Judgment.

394

and its findings of fact and conclusions of law in the office of the Clerk of this Court, in and by which judgment was directed to be entered in favor of the plaintiff and against the defendant for the sum of \$2,483.96 with interest thereon from the 17th day of May, 1933, and the costs and disbursements of this action, and such costs and disbursements having been duly taxed at \$26.00,

395

NOW, THEREFORE, on motion of Hawkins, Delafield & Longfellow, attorneys for the plaintiff, it is

396

ORDERED, ADJUDGED AND DECREED, that the plaintiff, Edward Jordan Dimock, as substituted executor of the Last Will and Testament of Henry C. Folger, Deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, Deceased, recover of the defendant, Walter C. Corwin, former Collector of Internal Revenue for the First District of New York, the sum of \$2,483.96 with interest thereon from the 17th day of May, 1933, as provided by Section 177 (b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936, together with the costs and disbursements of this action as taxed in the sum of \$26.00.

Judgment signed and entered this 21st day of March, 1938.

PERCY G. B. GILKES,
Clerk,

By J. G. COCHRAN,
Deputy Clerk.

Plaintiff's Petition and Order Allowing Appeal. 397

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

398

TO THE HONORABLE MORTIMER W. BYERS,
Judge of the District Court,
Eastern District of New York.

399

Now comes the plaintiff-appellant, Edward Jordan Dimock, as substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, by Hawkins, Delafield & Longfellow, his attorneys, and feeling himself aggrieved by the judgment of this Court entered on the 21st day of March, 1938, hereby prays that an appeal may be allowed to him from said judgment to the United States Circuit Court

400 *Plaintiff's Petition and Order Allowing Appeal.*

of Appeals for the Second Circuit and that citation issue, and, in connection with this petition, petitioner herewith presents his assignment of errors.

Petitioner further prays that an order be made fixing the amount of the bond to be given by plaintiff for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court
401 of Appeals for the Second Circuit.

Dated, New York, N. Y., May 26, 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff-Appellant.

The above named appeal is hereby allowed.

Dated, Brooklyn, N. Y., May 27, 1938.

402

MORTIMER W. BYERS,
U. S. D. J.

An undertaking on appeal in the usual form was duly approved and filed in the office of the Clerk of the District Court on May 27, 1938.

Assignment of Errors and Prayer for Modification for Plaintiff-Appellant. 403

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collector of Internal Revenue, First District of New York,
Defendant.

404

Now COMES the plaintiff-appellant, Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, by Hawkins, Delafield & Longfellow, his attorneys, and submits, presents and files his assignments of error complained of and says: 405

That in the records and proceedings of the Honorable United States District Court for the Eastern District of New York in a certain action entitled, "Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of

406 *Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.*

Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, plaintiff, against Walter C. Corwin, Late Collector of Internal Revenue, First District of New York, defendant," and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

407

1. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon more than one-half of the value of the stock held by him in joint tenancy with Emily C. J. Folger prior to the passage of any Federal Estate Tax Act did not constitute a deprivation of property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States of America.

408

2. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon more than one-half of the value of the stock held by him in joint tenancy with Emily C. J. Folger prior to the passage of any Federal Estate Tax Act was justified by the Federal Estate Tax Act.

3. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon the value of the stock contributed by Emily C. J. Folger to a joint tenancy of Henry C. Folger and Emily C. J. Folger prior to the passage of any Federal Estate Tax Act did not constitute a deprivation of property with-

*Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.* 409

out due process of law in contravention of the Fifth Amendment of the Constitution of the United States of America.

4. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon the value of the stock contributed by Emily C. J. Folger to a joint tenancy of Henry C. Folger and Emily C. J. Folger prior to the passage of any Federal Estate Tax Act was justified by the Federal Estate Tax Act. 410

5. The said Court erred in failing to make the conclusion of law that as to the Original Stock held in such joint tenancies referred to in the Court's conclusion number 7, one-half thereof, or shares of a value of \$1,803,509.59, did not constitute part of the gross or net estate of the decedent Henry C. Folger under Section 302 of the Revenue Act of 1926 as amended, or any of the subdivisions of said section. 411

6. The said Court erred in failing to make the conclusion of law that the inclusion of said sum of \$1,803,509.59 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

7. The said Court erred in failing to make the conclusion of law that the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the sum

412 *Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.*

of \$1,803,509.59, the amount of an additional one-half of the value of the Original Stock held in such joint tenancies, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and without legal sanction.

413 8. The said Court erred in failing to make the conclusion of law that the payment of the said additional tax, with interest thereon, was exacted of Emily C. J. Folger, as such Executrix as aforesaid, by defendant, illegally and without warrant of law.

9. The said Court erred in failing to make the conclusion of law that the Original Stock transferred as stated in the Court's conclusion number 11 and having a market value of \$846,772.15 did not constitute part of the gross estate of the decedent, Henry C. Folger, within Section 302 of the Revenue Act of 1926 as amended, or any subdivision thereof.

414 10. The said Court erred in failing to make the conclusion of law that the inclusion of said sum of \$846,772.15 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

11. The said Court erred in failing to make the conclusion of law that the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of

Assignment of Errors and Prayer for Modification 415
for Plaintiff-Appellant.

the value of the Original Stock so transferred to the joint accounts by Emily C. J. Folger prior to the enactment of any Federal Estate Tax Law in the amount of \$846,772.15, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and was without legal sanction.

12. The said Court erred in failing to make the conclusion of law that the payment of said additional tax, with interest thereon, was exacted of Emily C. J. Folger as such Executrix as aforesaid by defendant illegally and without warrant of law. 416

13. The said Court erred in failing to make the conclusion of law that the plaintiff, in addition to the amount of the judgment directed in the Court's conclusion number 18 is entitled to judgment in the sum of \$26,298.45, representing \$23,639.79 tax, and \$2,658.66 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$846,772.15, being the value of Original Stock transferred by Emily C. J. Folger to said joint tenancies, and also being a portion of one-half of the value of the Original Stock, with interest upon said sum of \$26,298.45 from the 17th day of May, 1933. 417

14. The said Court erred in failing to make the conclusion of law that the plaintiff, in addition, is entitled to judgment in the sum of \$26,578.88, representing \$23,891.86 tax and \$2,687.02

418 *Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.*

interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$956,737.44, being the remainder of one-half of the value of the Original Stock, with interest upon said sum of \$26,578.88 from the 17th day of May, 1933.

419 15. The said Court erred in refusing to pass upon the plaintiff's requests for conclusions of law submitted March 14, 1938, numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

16. The said Court erred in making the conclusion of law that the Commissioner of Internal Revenue properly determined that the value of the stock held in the joint account of "Henry C. Folger and Emily C. J. Folger, or the survivor", of \$3,773,881.06, should be included in the gross and net estates of the decedent for estate tax purposes.

420 17. The said Court erred in making the conclusion of law that the Commissioner of Internal Revenue properly determined that no part of the value of the joint account, representing property transferred thereto by Emily C. J. Folger, should be excluded from the gross and net estates, because Emily C. J. Folger received the same from the decedent without giving any consideration in money or money's worth.

WHEREFORE, said plaintiff-appellant respectfully prays:

Assignment of Errors and Prayer for Modification 421
for Plaintiff-Appellant.

1. That the judgment entered in said action be modified by adding thereto the sum of \$26,298.45, with interest thereon from the 17th day of May, 1933.

2. That the judgment entered in said action be modified by adding thereto in addition the sum of \$26,578.88, with interest thereon from the 17th day of May, 1933.

3. That the lower court be directed to modify said judgment by adding thereto the sum of \$26,298.45, with interest thereon from the 17th day of May, 1933. 422

4. That the lower court be directed to modify said judgment by adding thereto in addition the sum of \$26,578.88, with interest thereon from the 17th day of May, 1933.

5. That said plaintiff-appellant have such other, further or different relief as may be just. 423

Dated, May 26, 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
 Attorneys for Plaintiff-Appellant, Ed-
 ward Jordan Dimock, as Substituted
 Executor of the Last Will and Testa-
 ment of Henry C. Folger, Deceased,
 and as Executor of the Last Will
 and Testament of Emily C. J. Fol-
 ger, Deceased.

424

Citation.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

425

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

426

To: WALTER C. CORWIN, Appellee,
and

MICHAEL F. WALSH, his Attorney;

GREETING: You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, held at Federal Courthouse in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Eastern District of New York, at Brooklyn, New York, wherein Edward Jordan Dimock, as substituted Executor of the Last Will and Testament of

Citation.

427

Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, is appellant, and Walter C. Corwin, is appellee, to show cause, if any there be, why the judgment entered herein on the 21st day of March, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Mortimer W. Byers, Judge of the District Court of the United States, Eastern District of New York, on this 27th day of May, 1938. 428

MORTIMER W. BYERS,
U. S. D. J.

429

430

**Defendant's Notice of Appeal and Order
Allowing Appeal.**

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

431

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

L-6839

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

SIR:

432

PLEASE TAKE NOTICE that the defendant above
named hereby appeals to the United States Circuit
Court of Appeals for the Second Circuit from the
judgment of this Court in favor of the plaintiff,
and against the defendant in the sum of \$2,483.96,
together with interest and costs, entered in the
office of the Clerk of this Court on the 21st day
of March, 1938, and from each and every part of
said judgment, as well as from the whole thereof.

Dated, Brooklyn, New York,
1938.

Yours, etc.,

MICHAEL F. WALSH,
United States Attorney for the
Eastern District of New York,

*Defendant's Notice of Appeal and Order
Allowing Appeal.* 433

To:

Honorable PERCY G. B. GILKES,
Clerk,
United States District Court for the
Eastern District of New York,
United States Court House,
Brooklyn, New York.

Messrs. HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff, 434
49 Wall Street,
Borough of Manhattan,
New York City.

The appeal of the defendant above named as
prayed for in the foregoing petition is hereby
allowed.

Dated, Brooklyn, New York, June 1st, 1938.

MORTIMER W. BYERS, 435
U. S. D. J.

436 **Assignment of Errors for Defendant-Appellant.**

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

437 EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839

438 Now comes the defendant above named, Walter
C. Corwin, Late Collector of Internal Revenue,
First Collection District of New York, by his at-
torney, Michael F. Walsh, United States Attorney
for the Eastern District of New York, and pre-
sents his assignment of errors complained of as
follows:

1. That the trial court erred in directing the
entry of judgment in favor of the plaintiff for the
sum of \$2,483.96 with interest and costs, as set
forth in its conclusion of law number 18, p. 100, or
for any amount whatever.

2. That the court erred in failing to direct
judgment in favor of defendant dismissing this
action with costs.

Assignment of Errors for Defendant-Appellant. 439

3. That the court erred in holding plaintiff entitled to a deduction from decedent's estate for charitable bequests in excess of one-half the value of the said estate less its debts (Finding No. 43, p. 95; Concl. No. 15, pp. 99-100).

4. That the court erred in failing to hold that under Section 17 of the Decedent's Estate Law of New York, where the testator is survived by his widow, bequests to charity to the extent of the excess over one-half of his estate, less the debts, is invalid and voidable. 440

5. That the court erred in failing to hold that by reason of the right of the widow under Section 17 of the Decedent's Estate Law of New York, charity takes the excess over one-half of the estate, less debts, by reason of the charitable intent of the widow rather than by reason of the provisions of the will of the testator.

6. That the court erred in failing to hold that an outstanding power to void a charitable bequest in part, such as that power in the widow under Section 17 of the Decedent's Estate Law of New York, renders the bequest valueless to the extent that it is voidable. 441

7. That the court erred in failing to hold that the amount or value of the bequest must be determined as of the date of the decedent's death and that subsequent events affecting the value, such as the waiver by the widow of her rights under Section 17, must be ignored.

8. That the court erred in failing to hold that the limitation upon the charitable bequest as imposed by the New York law is equally as effective as if imposed by the testator's will.

442 *Assignment of Errors for Defendant-Appellant.*

9. That the court erred in failing to hold that the resulting value of the bequest to charity has the same limitation in value as it would have if the interest of the widow was a vested property right.

10. That the court erred in failing to hold that the receipt by charity of an amount in excess of one-half of the testator's estate is actually and essentially the result of the benevolence of the widow in waiving the provisions of Section 17 of the Decedent's Estate Law of New York.

11. That the court erred in holding, in its conclusion of law number 15, that the sum of \$6,396,898 was properly allowed as a deduction by the Commissioner of Internal Revenue.

12. That the court erred in holding, in its conclusion of law number 16, that the probate of the Will of Henry C. Folger, coupled with the waivers with respect to rights under Section 17 of the Decedent's Estate Law of New York, established once and for all the proportion of the estate going to charity.

13. That the court erred in holding, in its conclusion of law number 17, that the defendant's second affirmative defense is insufficient in law.

WHEREFORE, said defendant respectfully prays that said errors be corrected and that the judgment in favor of the plaintiff herein be reversed and complaint and action dismissed.

MICHAEL F. WALSH,
United States Attorney,
Eastern District of New York,
Attorney for Defendant.

Citation.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839

446

By the Honorable MORTIMER W. BYERS, United
States District Judge for the Eastern District
of New York, to Edward Jordan Dimock, as
Substituted Executor of the Last Will and
Testament of Henry C. Folger, deceased, and
as Executor of the Last Will and Testament
of Emily C. J. Folger, deceased, GREETING:

447

YOU ARE HEREBY CITED and admonished to be
and appear before the United States Circuit Court
of Appeals for the Second Circuit to be held at
the United States Court House in the Borough of
Manhattan, City and State of New York, within
thirty (30) days from the date hereof, pursuant
to an appeal filed in the office of the Clerk of the
United States District Court for the Eastern Dis-

Citation.

trict of New York, wherein Walter C. Corwin, Late Collector of Internal Revenue, First District of New York, is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the Eastern District of New York, and the Circuit above named, this 1st day of June, in the year of our Lord, one thousand nine hundred and thirty-eight, and of the independence of the United States the one hundred and sixty-second.

MORTIMER W. BYERS,
United States District Judge.

Stipulation and Order Settling Record.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

452

IT IS HEREBY STIPULATED AND AGREED that the
foregoing is a true copy of the transcript of the
record of the District Court in the above entitled
matter, as agreed upon by the parties.

453

Dated, New York, N. Y., June / 3 , 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff-Appellant.

MICHAEL F. WALSH,
Attorney for Defendant-Appellant,

By VINE H. SMITH,
Asst. U. S. Attorney.

454

Stipulation and Order Settling Record.

On reading the foregoing consent of the attorneys for the respective parties herein, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated, Brooklyn, N. Y., June / 4 *th* , 1938.

MORTIMER W. BYERS,
U. S. D. J.

455

456

Clerk's Certificate.

457

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

458

I, PERCY G. B. GILKES, Clerk of the District
Court of the United States of America for the
Eastern District of New York, do hereby certify
that the foregoing is a correct copy of the printed
transcript of the record of the said District Court
in the above entitled matter, as agreed on by the
parties and ordered filed by the Court.

459

IN TESTIMONY WHEREOF, I have caused the
seal of the said court to be hereunto affixed at the
City of New York in the Eastern District of New
York, this / 4 ~~th~~ day of June, in the year of our
Lord One thousand nine hundred and thirty-eight
and of the Independence of the United States the
One hundred and sixty-second year.

PERCY G. B. GILKES,

Clerk.

SEAL

By

J. R. Laver
J. R. Laver



UNITED STATES CIRCUIT COURT OF APPEALS

460

FOR THE SECOND CIRCUIT.

EDWARD JORDAN DIMOCK, as Substituted
Executor of the Last Will and Testament of
Henry C. Folger, deceased, and as Executor of
the Last Will and Testament of Emily C. J.
Folger, deceased,

Plaintiff-Appellant,

against

WALTER C. CORWIN, late Collector of Internal
Revenue, First District of New York,
Defendant-Appellee.

WALTER C. CORWIN, late Collector of Internal
Revenue, First District of New York,
Defendant-Appellant,

461

against

EDWARD JORDAN DIMOCK, as Substituted
Executor of the Last Will and Testament of
Henry C. Folger, deceased, and as Executor of
the Last Will and Testament of Emily C. J.
Folger, deceased,

Plaintiff-Appellee.

Before: MANTON, A. N. HAND and CHASE,
Circuit Judges.

Cross appeals from the District Court for the
Eastern District of New York. Action to recover
federal estate taxes paid under protest. Decree
for defendant; plaintiff and defendant appeal.
Affirmed.

462

Michael F. Walsh, United States Attorney for
the Eastern District of New York, Attor-
ney for Collector.

James W. Morris, Asst. Attorney General.

Sewall Key, Clarence D. Dawson, J. L. Mon-
arch, Special Assistants to the Attorney
General.

Vine H. Smith, Asst. U. S. Attorney, of Coun-
sel.

463

Opinion.

Hawkins, Delafield & Longfellow, Attorneys
for Plaintiff.

E. J. Dimock, C. O. Donahue, J. D. Rawlings,
of Counsel.

MANTON, Circuit Judge.

464 This action was commenced by the widow of Henry C. Folger who was the executrix of his estate. He died June 11, 1930 and she died February 21, 1936. The present appellant is executor of her estate and substituted executor of the estate of Henry C. Folger, and now maintains this action to recover federal estate taxes paid under protest.

On the plaintiff's appeal, the question presented is whether there should be included in the gross estate, (1) the whole value of the property held in joint tenancy instead of but one-half; (2) stocks contributed by the survivor of the joint tenancy. On the defendant's appeal, there is raised the sufficiency of the defense as to the claim of exemption from federal estate tax of the excess over one-half of the estate of the decedent which went to charity.

465

Before May 29, 1912, Folger gave to his wife 251 shares, and prior to March 10, 1914, 656½ shares of stock of different oil corporations. These shares were registered in her name on the books of each corporation. On February 9, 1916, she transferred into their joint name 250 shares of the first 251 shares of stock. She later transferred into their joint names one-half of the 656½ shares of stock and, on February 24, 1916, she transferred the remainder of these shares to their joint names. At the time of his death, the stock in their

Opinion.

466

joint names was valued at \$846,772.15.

On April 17, 1914, Mr. Folger had begun establishing joint accounts in the stocks of various oil companies which he did either by transferring shares to the joint names of himself and his wife, or by purchasing shares which he directed to be registered in their names. By September 9, 1916, the effective date of the first federal estate tax act (39 Stat. 756), shares of stock had been placed in their joint names (including the shares contributed by Mrs. Folger as referred to) which had a value as of the date of his death of \$3,607,019.19.

467

The Commissioner of Internal Revenue determined that, for the purpose of assessment, the federal estate tax of Mr. Folger should include this sum of \$3,607,019.19 instead, as claimed by the plaintiff, a deduction of the sum of \$1,803,509.59 representing the value of one-half of the shares held in joint tenancy. It is contended that, at least the \$846,772.15 representing the value of the shares contributed by Mrs. Folger should be deducted. The tax was paid and a refund refused.

468

Section 302(e) of the Revenue Act of 1926 (ch. 27, 44 Stat. 9) which was in effect in June 1930, when Folger died, provides that there shall be included in the gross estate of the decedent, the value of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, except such part thereof as may be shown to have originally belonged to such other person, and never to have been received or acquired by the latter from the decedent for less than an adequate or full consideration in money or money's worth. This

Opinion.

469

joint tenancy was created in September, 1916, and no consideration in money or money's worth was paid by Folger's wife for any of the stock in such joint tenancy.

470

Plaintiff argues that this statute would be unconstitutional if applied to tax the entire estate. A statute may be retroactive and valid if it deals with transactions closed after, but initiated before, its enactment. In the instant case, Congress intended to make taxable all transfers made before or after the enactment effective when the transfer took place. The argument of the plaintiff is that the statute is in contravention of the Fifth Amendment in that it taxes an interest of the survivor of the tenancy vested before the statute was passed.

471

Knox v. McElligott (258 U. S. 546) involved a joint estate created in 1912 and the question was whether the whole value should be included in the gross estate of a decedent who died while the 1916 act was in effect. The 1916 Act differed from §302(h) of the Revenue Act of 1926 in that the latter declared it the purpose of Congress to reach all joint estates, including those created before the statute. In the Knox case, the tax was resisted upon the grounds (a) that Congress did not intend to apply the statute to joint estates created before the enactment, and (b) that the statute was void if it reached the survivor's half of the joint estate. The Supreme Court decided that Congress did not intend that the statute should apply to joint estates created before its enactment. There was, therefore, no occasion to consider whether any event which occurred at death would have justified the tax if Congress

Opinion.

472

had attempted to reach the entire joint estate. As to this decision so limited, see *Griswold v. Commr.* (290 U. S. 56) and *Cahn v. United States* (297 U. S. 691). *Tyler v. United States* (281 U. S. 497) involved an estate by the entirety. Upon the death of the husband, who had initiated during his life-time a transaction which resulted after his death in the surviving spouse owning free and clear the whole property, the court held that while there was not a transfer in the strict sense of the word, it was nevertheless true that the decedent's death "brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result." A tax on the whole value of the estate by the entirety was sustained. The same reasoning we think applies to joint estates where the purpose to tax joint estates, irrespective of the time of their creation, had been made clear. The Supreme Court has not doubted the power of Congress to reach by taxation the entire estate. *Gwinn v. Commr.*, 287 U. S. 224; *Foster v. Commr.*, 303 U. S. 618. If an event occurs at death which justifies a tax upon the whole value of the joint estate created after the statute, the same event will justify a tax upon the whole value of a joint estate created before the statute. Section 302(h) of the 1926 Act clearly indicates such a Congressional purpose to tax the whole value in every instance. Since the *Tyler* case, the Supreme Court has been consistent in so ruling. *Foster v. Commr.*, *supra*; *Gwinn v. Commr.*, *supra*. Congress has such power to legislate and require the inclusion of the whole value because the death of a joint tenant results in

473

474

Opinion.

475

such a shifting of economic benefits in the entire property as to make appropriate a tax on that result measured by the value of the entire property. Therefore, it is not material that the joint tenancy was created prior to the first federal estate tax of 1916. *Tyler v. Commr.*, *supra*; *Helvering v. Bowers*, 303 U. S. 618.

476

Joint tenancies at common law and tenancies by the entirety have one marked similarity—it is the incident of the right of survivorship. Such right is the immediate consequence of the peculiar mode in which joint tenants are seized, that is, of the whole jointly but of nothing separately. The difference between the two classes of tenancies is the right which exists in a joint tenant, and not in a tenant by the entirety, to sever the tenancy by his sole act as an inter vivos transaction, and thus destroy the right of survivorship. Unless a joint tenancy be severed during the lives of the joint tenants, the right of survivorship persists, and upon the death of one of the joint tenants, the survivor takes the whole estate. Neither joint tenant can dispose of any interest in the property by will and defeat the right of survivorship of the whole. The distinction between these tenancies is deemed unimportant in the application of a taxing statute. *Commr. v. Emory*, 62 Fed. 2, 591; *O'Shaughnessy v. Commr.*, 60 Fed. 2, 235.

477

In the instant case, before the death of the decedent, the surviving tenant had the right to possess and use the whole property. So too did her husband. Upon the death of the decedent and because of it, Mrs. Folger became entitled to the exclusive possession, use and

Opinion.

478

enjoyment of the whole property and entitled to hold it as her own. Then she acquired the power of disposing of the property by will. Until the death of her husband, the complete ownership had not passed as to any part of the property. It therefore, was neither arbitrary nor capricious to include the entire value of the property in the decedent's estate and there was no constitutional objection. *Tyler v. Commr.*, *supra*; *Helvering v. Bowers*, *supra*; *Foster v. Commr.*, *supra*; *Sheets v. Commr.*, 95 Fed. 2, 727. As stated in the *Tyler* case, §302(e) of the 1926 Act, was enacted to prevent an avoidance of an estate tax. It was a part of the general scheme of taxation.

479

Plaintiff argues that §302(e) which "excepts such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth" prevents including the value of the property which belonged to Mrs. Folger just before the creation of the joint estate. If the acquisition was for less than an adequate and full consideration in money or money's worth occurred before the enactment of the first federal estate tax act, it must be included. Congress has placed this tax on all joint estates because they accomplish the result of transferring the decedent's property to the surviving spouse. But Congress has excluded any portion of the property which does not represent such a transfer. Upon the husband's death, every part of the joint estate which first belonged to him becomes the sole property of the widow and the test for determining the property excluded is whether it ever

480

481

Opinion.

belonged to the decedent. If it did and was parted with for less than an adequate consideration, it is not to be excluded. Congress has provided that all such transactions be included without causing an inquiry in each case, whether the particular gift was designedly made to evade the tax.

482

Mr. Folger devised and bequeathed legacies to his sisters, brothers, nephews and nieces and the remainder in trust for the erection and maintenance of the Folger Shakespeare Memorial Library at Washington and for the payment of specific sums to his wife, his brother and sisters, his wife's brothers, his nieces and nephews and his wife's nieces and nephews during their lives. Upon the death of Mr. Folger, all persons who under the intestate laws of New York would be entitled to a share in his estate, executed written waivers of any objection to his will which they may have had under §17 of the Decedent's Estate Law of New York (Cons. Laws, ch. 13, art. 2417). These waivers were dated ten days after Mr. Folger's death and were embodied in waivers of the issue and service of citations upon the probate of his will. The gross estate was appraised at \$15,359.827.69 and after deductions of \$10,468,108.70 there was a fixed net estate of \$4,891,646.99. Included in these deductions was the sum of \$6,396.898 on account of decedent's bequests to charity. Defendant contends that the Commissioner erred in allowing as a deduction so much of the amount bequeathed to charity as exceeded one-half of the decedent's gross estate less his debts and that since the tax on such amount exceeds the tax sought to be recovered, the plaintiff cannot succeed.

483

The argument is that the gifts to charity in excess of one-half of the gross estate less the debts may not be allowed as a deduction under §303(a)(3) of the Revenue Act of 1926 (44 Stat. 9) because the charity takes such excess through the charitable intent of the widow and the gift is therefore in effect one from the widow and not from the decedent; also that gifts to the extent of such excess may not be allowed as a deduction under §303(a)(3) because the amount of such gifts cannot be ascertained as of the date of the decedent's death. 485

It is agreed that the bequests were charitable within §303(a)(3). Therefore to warrant the deduction allowed by statute, it is sufficient to show that the charity took the gift by bequest, legacy, devise or transfer from the decedent. In *re DeLamar*, 203 A. D. 638, *affd.* 236 N. Y. 604. The excess did not pass to Mrs. Folger and it is not explained how the gift could be from the widow without this having taken place. In *Humphrey v. Millard* (79 Fed. 2, 107, 108) where the government sought to tax the excess of a gift to charity over one-half of the decedent's estate where the widow had waived her rights under §17 of the decedent's estate law, we said that "until and unless the widow exercised her statutory right to defeat partially the tax-exempt testamentary disposition of the residuary estate which her husband had made, his will was effective as to all of it. This right was in the nature of a power which could be renounced. Her waiver of it was unnecessary to make the will valid." We held that the will having been probated, it was valid and disposed of the residuary estate as of the date of the death of the 486

487

Opinion.

decedent in a manner exempt from federal estate taxation under §43(2)(3) of the Revenue Act of 1921. See: *Mead v. Welch*, 95 Fed. 617. The gift to charity in excess of one-half the estate was valid. It did not pass to Mrs. Folger but passed under Mr. Folger's will to the charity named therein and therefore falls within the terms of §303(a)(3) and was properly allowed as a deduction. Here the estate which had vested in charity was not divested at all but simply was more firmly vested in charity by the waivers of the widow and next of kin.

488

Decree affirmed.

489

UNITED STATES CIRCUIT COURT
OF APPEALS,
SECOND CIRCUIT.

490

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of November, one thousand nine hundred and thirty-eight.

Present: HON. MARTIN T. MANTON,
HON. AUGUSTUS N. HAND,
HON. HARRIE B. CHASE,

Circuit Judges.

491

EDWARD JORDAN DIMOCK, as substituted executor, etc.,
Plaintiff-Appellant.

vs.

WALTER C. CORWIN, late Collector, etc.,
Defendant-Appellant.

Appeal from the District Court of the United States for the Eastern District of New York.

492

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with interest.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

WM. PARKIN,
Clerk.

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UNITED STATES CIRCUIT COURT,
OF APPEALS,

SECOND CIRCUIT.

EDWARD JORDAN DIMOCK, ETC.,

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vs.

WALTER C. CORWIN, ETC.

ORDER FOR MANDATE

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United States Circuit Court of Appeals
Second Circuit
Filed Nov. 17, 1938
William Parkin, Clerk.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 165, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

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Edward Jordan Dimock, as substituted
executor, etc.,
Plaintiff-Appellant,
against

Walter C. Corwin, late Collector, etc.,
Defendant-Appellant.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this seventeenth day of November, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the said United States the one hundred and sixty-third.

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SEAL

WM. PARKIN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 3, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following the hearing of No. 391.


And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone took no part in the consideration and decision of this application.

(9383)



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